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Is there scope for the wider application of fast-track arbitrations in the resolution of international commercial disputes?

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Author: Faith Serbest

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**IS THERE SCOPE FOR THE WIDER APPLICATION OF FAST-TRACK
ARBITRATIONS IN THE RESOLUTION OF INTERNATIONAL
COMMERCIAL DISPUTES?**

Thesis submitted to the Dickson Poon School of Law, King's College London,
for the degree of Doctor of Philosophy in Law Research by Fatih Serbest

27 June 2013

ABSTRACT

Arbitration has long been the preferred method of resolving commercial disputes as, at its best, it is both cheaper and quicker than litigation. But by the 1980s many international commercial arbitration cases were proving so slow and expensive that its advantages were being questioned. At this time several approaches were tried to make arbitration faster and cheaper. 'Fast-track arbitration' was one of these new approaches. In the last 25 years fast-track arbitration has become "institutionalized", as an increasing number of institutions have enacted specific sets of expedited rules. Despite this trend, there is still uncertainty over whether fast-track procedures can become a viable alternative to conventional international arbitration. With more than 25 years of practical application of FTA to look at, it is time to ask the question which forms the title of this thesis: Is there a scope for the wider application of fast-track arbitrations in the resolution of international commercial disputes?

In order to find an answer, this thesis looks at the development of regular arbitration and why it changed from a swift and economic method of solving disputes into the cumbersome and unpopular method of the 1980s. We will then consider the various attempts that were made to improve the situation, culminating in the development of international fast-track commercial arbitration (IFTCA) that we see today. Having examined the defining features of IFTCA, the thesis will be in a position to weigh the evidence on whether there is a scope for the wider application of fast-track procedures.

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ABBREVIATIONS

Institutions, Organisations and Rules

AAA	American Arbitration Association
AAA Rules	AAA Commercial Arbitration Rules of 2009
AAA/ICDR Rules	AAA/ICDR International Arbitration Rules of 2009
ACICA	Australian Centre for International Commercial Arbitration
ACICA Rules	ACICA Arbitration Rules of 2011
ACICA FTA Rules	ACICA Expedited Arbitration Rules of 2011
ABA	American Bar Association
AIA	Italian Arbitration Association
ASA	Association Suisse de l'Arbitrage (Swiss Arbitration Association)
ASEAN	Association of Southeast Asian Nations
BCC	Basel Chamber of Commerce
BCC Rules	Basel Chamber of Commerce Arbitration Rules of 1995
CAM	Camera Arbitrale Milano (Chamber of Arbitration of Milan)
CAM Rules	CAM Arbitration Rules of 2010
CAMARA	The Court of Arbitration of Madrid Official Chamber of Commerce and Industry of Madrid
CAMARA Rules	CAMARA Arbitration Rules of 2008
CAMCA	Commercial Arbitration and Mediation Centre for the Americas
CAS	Court of Arbitration for Sport
CAS-Code	Court of Arbitration for Sport Code
CAS Rules	Court of Arbitration for Sport Rules
CCA	College of Commercial Arbitrators

CCIG	Chamber of Commerce and Industry of Geneva
CCIG Rules	Chamber of Commerce and Industry of Geneva Arbitration Rules (1992)
CCPIT	China Council for the Promotion of International Trade
CEDR	Centre for Effective Dispute Resolution
CEDR Rules	CEDR Rules for the Facilitation of Settlement in International Arbitration (2009)
CEPANI	Belgian Centre for Arbitration and Mediation
CEPANI Rules	Arbitration Rules of the Belgian Centre for Arbitration and Mediation
CIArb	Chartered Institute of Arbitrators
CIDRA	Chicago International Dispute Resolution Association
CIDRA Rules	CIDRA Arbitration Rules of 2005
CIETAC	China International Economic and Trade Arbitration Commission
CIETAC Rules	CIETAC Arbitration Rules of 2012
CIMAR	Construction Industry Model Arbitration Rules
CMI	Comité Maritime International
CPR	Institute for Center for Public Resources Institute for Dispute Resolution
CPR Rules	Global Rules for Accelerated Commercial Arbitration of 2009
CRCICA	Cairo Regional Centre For International Commercial Arbitration
CRT	Claims Resolution Tribunal for Dormant Accounts in Switzerland
CTF	Coffee Trade Federation
DAC	Departmental Advisory Committee on Arbitration Law

DIS	Deutsche Institution für Schiedsgerichtsbarkeit (German Institute of Arbitration)
DIS Rules	DIS Arbitration Rules (1998)
DIS SREP	DIS Supplementary Rules for Expedited Proceedings (2008)
EC	European Community
ECA	European Court of Arbitration
ECA Rules	ECA Pre-Arbitral Referee Rules of 1997
ECAFE	United Nations Economic Commission for Asia and the Far East
ECOSOC	United Nations Economic and Social Council
EEC	European Economic Community
EU	European Union
FAA	Federal Arbitration Act of United States of America (1926)
FALCA	Fast and Low Cost Arbitration (LMAA)
FCC	Finland Chamber of Commerce
FCC Rules	FCC Arbitration Rules of 2004
FCC FTA Rules	FCC Expedited Arbitration Rules of 2004
Fed.R. Civ. Proc.	Federal Rules of Civil Procedure of United States
FIDIC	International Federation of Consulting Engineers
FOSFA	Federation of Oils, Seeds and Fats Association
FTA	Fast-track Arbitration
FTAC	Foreign Trade Arbitration Commission
GAFTA	Grain and Feed Trade Association
GATT	General Agreement on Tariffs and Trade
HKIAC	Hong Kong International Arbitration Centre
HKIAC Rules	HKIAC Arbitration Rules of 2008
IACAC	Inter-American Commercial Arbitration Commission
IBA	International Bar Association

IBA Rules	IBA Rules of Ethics for International Arbitrators ICA Indian Council of Arbitration
IAMA	Institute of Arbitrators and Mediators of Australia
IAMA FTA Rules	IAMA Fast-track Arbitration Rules of 2007
ICA	International Commercial Arbitration
ICAC	Moscow International Commercial Arbitration Court
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
ICC Court	International Court of Arbitration of the ICC
ICC Rules	ICC Rules of Arbitration of 2012
ICC Techniques	Techniques for Controlling Time and Costs in Arbitration: Report from the ICC Commission on arbitration of 2007
ICCA	International Council for Commercial Arbitration
ICCA	Handbook International Council for Commercial Arbitration Handbook
ICDR	American Arbitration Association International Center for Dispute Resolution
ICSID	International Centre for the Settlement of Investment Disputes
ILA	International Law Association
IFCAI	International Federation of Commercial Arbitration Institutions
JCAA	Japan Commercial Arbitration Association
JCAA Rules	JCAA Commercial Arbitration Rules of 2008
KCAB	Korean Commercial Arbitration Board
KCAB Rules	International Arbitration Rules of the KCAB (2011)
KLRCA	Kuala Lumpur Regional Centre for Arbitration
KLRCA Rules	KLRCA Arbitration Rules of 2010
KLRCA FTA Rules	Fast-track Arbitration Rules of the KLRCA (2012)
LCIA	London Court of International Arbitration

LCIA Rules	LCIA Arbitration Rules of 1998
LIA	Law International Arbitration
LMAA	London Maritime Arbitration Association
LMAA	London Maritime Arbitration Association 2002
LME	London Metal Exchange
LRBA	London Rice Brokers' Association
MAC	Merger and Acquisitions
NAFTA	North American Free Trade Agreement
NAI	Netherlands Arbitration Institute
NAI Rules	NAI Arbitration Rules of 2010
PCA	Permanent Court of Arbitration (The Hague)
PLC	Practical Law Company
QMUOL	Queen Mary, University of London
SCAI	Swiss Chambers' Arbitration Institution (Swiss Chambers)
SCAI Rules	Swiss Rules of International Arbitration (2012)
SCC	Stockholm Chamber of Commerce Arbitration Institute
SCC Rules	Arbitration Rules of the Arbitration Institute of the Stockholm Chamber of Commerce (2010)
SCC FTA Rules	SCC Expedited Arbitration Rules of 2010
SIA	School of International Arbitration, Queen Mary UOL
SIA/WC Survey 2012	SIA and White & Case LLP's International Arbitration Survey: Current and Preferred Practices in the Arbitral Process (2012)
SIA/WC Survey 2010	SIA and White & Case LLP's International Arbitration Survey: Choices in international arbitration (2010)
SIA/PWC Survey 2008	SIA and Pricewatercoopers International Arbitration Survey: International arbitration: corporate attitudes and practices (2008)

SIA/PWC Survey 2006	SIA and Pricewatercoopers International Arbitration Survey: International arbitration: corporate attitudes and practices (2006)
SIAC	Singapore International Arbitration Centre
SIAC Rules	SIAC Arbitration Rules of 2012
TCC	Ticino Chamber of Commerce
TCC Rules	Ticino Chamber of Commerce Arbitration Rules of 1997(Lugano Arbitration Rules)
UDRP	Domain-Name Dispute-Resolution Policy
UN	United Nations
UNCC	United Nations Compensation Commission
UNCITRAL	United Nations Commission for International Trade Law
UNCITRAL Model Law	Model law on International Commercial Arbitration, adopted by UNCITRAL on June 21, 1985
UNCITRAL Rules (1976)	UNCITRAL Arbitration Rules of 1976
UNCITRAL Rules	UNCITRAL Arbitration Rules of 2010
UNIDROIT	International Institute for the Unification of Private Law
UOL	University of London
Venice	Venice Arbitration Court Rules 1998
VIAC	International Arbitral Centre of the Austrian Federal Economic Chamber (Vienna International Arbitration Centre)
VIAC Rules	VIAC Rules of Arbitration (Vienna Rules) of 2013
WC	White & Case LLP
WIPO	World Intellectual Property Organisation
WIPO Rules	WIPO Arbitration Rules of 2002
WIPO FTA Rules	Expedited Arbitration Rules of the WIPO (2002)
ZCC	Zurich Chamber of Commerce
ZCC Rules	International Arbitration Rules of Zurich Chamber of Commerce (1989)

General Abbreviations

ABQB	Court of Queen's Bench of Alberta
AC	Law Reports, House of Lords (Appeal Cases)
ADR	Alternative Dispute Resolution
ADRLJ	Arbitration and Dispute Resolution Law Journal
AG	<i>Aktiengesellschaft</i>
All ER	All England Law Reports
ALR	Australian Law Reports
Am J Comp L	American Journal of Comparative Law
Am J Int'l L	American Journal of International Law
Am Rev Int'l Arb	American Review of International Arbitration
Am U Int'l L Rev	American University International Law Review
Ann IDI	Annuaire de l'Institut de droit international
Annot.	Annotation
ARB	Arbitration
Arb J	Arbitration Journal
Arb Int'l	Arbitration International
Arbitration	Arbitration, Journal of the Chartered Institute of Arbitrators
Arbitration News	Newsletter of the Arbitration Committee of the Legal Practice Division of the International Bar Association
Ariz. L. Rev.	Arizona Law Review
art. / arts.	article / articles
ASA Bulletin	Swiss Arbitration Association Bulletin
Asian DR	Asian Dispute Review
Asia Pac. L. Rev.	Asia Pacific Law Review
ATF	Arrêts du Tribunal Fédéral Suisse
B.C.	Before Christ
Betriebs-Berater	<i>Der Betriebs-Berater</i> (German journal)
Bezirksgericht	Court of First Instance, Switzerland
BGB	Bürgerliches Gesetzbuch (German Civil Code)

BGE	Entscheidungen des schweizerischen Bundesgerichts
BGH	Bundesgerichtshof (German Supreme Court)
BGHZ	Sammlung der Entscheidungen des Bundesgerichtshofs in Zivilsachen
BIT / BITs	Bilateral Investment Treaty / Bilateral Investment Treaties
BJM	Basler Juristische Mitteilungen
BLR	Business Law Review
Boston U Int'l L J	Boston University International Law Journal
B.U. L. Rev.	Boston University Law Review
Bus. L. Int'l	Business Law International
BSK-IPRG-Name	<i>Basler Kommentar</i> (Basel Commentary) on the Swiss PIL / author
BT-Drs	<i>Bundestags-Drucksache</i>
BverfGE	<i>Entscheidungen des Bundesverfassungsgerichts</i>
BYBIL	British Yearbook of International Law
CA	Court of Appeal of England and Wales / Cour d'Appel
CAA	China Arbitration Act
Cal.	California
<i>Can. Bus. L.J.</i>	Canadian Business Law Journal
Cap.	<i>Caput</i> , chapter
Cardozo J. Int'l & Comp.L.	Cardozo Journal of International and Comparative Law
Cas.	French <i>Cour de cassation</i>
Cass. Civ.	French Cassation civil
Case W Res J Int'l L	Case Western Reserve Journal of International Law
CC	Swiss Civil Code
CCAS	Camera di conciliazione e di arbitrato per lo sport

CCI	Chamber of Commerce and Industry of the Russian Federation
CCP	Code of Civil Procedure
Ch.	Chapter
ChD	Chancery Division
CHF	Swiss Frank
CIF	Cost, insurance, freight
CIFFO	Cost Insurance and Freight Free Out
Cir.	Circuit
CISG	United Nations Convention on the International Sale Goods
Civ.	Civil
CJ	Cour de justice (Geneva)
CLR	Commonwealth Law Reports
C.L.R.	Consruction Law Reports
Clunet	Journal de droit international
CMAC	China Maritime Arbitration Committee
CNY	Chinese Yuan
CO	Swiss Code of Obligations
Columbia J Transnat'l L	Columbia Journal of Transnational Law
Comm	Commercial
CONI	Comitato olimpico nazionale italiano
Con LR	Construction Law Reports
Cons L Rev	Consruction Law Review
Consid.	Consideration
Contemp. Asia Arb. J.	Contemporary Asia Arbitration Journal
CPR	Civil Procedure Rules (England)
CRB	Contract Recognition Board
Croat Arbit Yearb	Croatian Arbitration Yearbook
DAC	Departmental Advisory Committee

Décisions et rapports	Décisions et rapports of the European Court of Human Right
DFT	Decision of the Swiss Federal Tribunal
DIS-Materialien	DIS collection of materials on arbitration
Disp Res J	Dispute Resolution Journal
DLR	Dominion Law Reports
Doc.	Document
DR	<i>Décisions et</i> rapports of the European Court of Human Right
DZwiR	Deutsche Zeitschrift für Wirtschaftsrecht
EC	European Community
ECHR	European Convention on Human Rights
ECJ	Court of Justice of the European Communities
ECR	Report of Cases before the Court of Justice of the European Communities
ECT	EC Treaty
éd.	<i>édition</i>
ed. / eds.	Edition, editor / editors
EDNY	Eastern District of New York
<i>e.g.</i>	<i>exempli gratia</i> , for instance
EHRR	European Human Rights Reports
EJCL	Electronic Journal of Comparative Law
ER	English Reports
<i>et al.</i>	<i>et alii</i> / and others
<i>etc.</i>	<i>et cetera</i> , and so on
<i>et seq.</i>	<i>et sequitur</i>
European Convention	European Convention on International Commercial Arbitration 1961 (Geneva)
European Comm. HR	European Commission of Human Rights
European Ct. HR	European Court of Human Rights
EWCA Civ	Neutral citation for England and Wales Court of Appeal civil division decisions

EWHC	England and Wales High Court
EWiR	Entscheidungen zum Wirtschaftsrecht
F 2d	The Federal Reporter Second Series
F 3d	The Federal Reporter Third Series
FAA	United States Federal Arbitration Act
Fair Empl Prac Cas	Fair Employment Practice Cases
FCEC	Federation of Civil Engineering Contractors
FEI	Fédération Equestre Internationale (International Equestrian Federation)
FFG	Fédération Française de Gymnastique
FIA	Fédération Internationale de l'Automobile
FJS	Fiches juridiques suisses
Fn.	Footnote
FOB	Free on board
FOSFA	Federation of Oils, Seeds and Fats Associations
FS	Festschrift
F Supp	Federal Supplement
GAFTA	Grain & Feed Trade Association
Gaz. Pal.	Gazette du Palais
GDR	German Democratic Republic
GE	<i>Genève</i> / Geneva
Geneva Convention	Convention on the Execution of Foreign Arbitral Awards of 1927 (the Geneva Convention of 1927)
Geneva Protocol	The Geneva Protocol of 1923 on Arbitration Clauses
Geo Wash J Int'l L & Eco	George Washington University Journal of International Law and Economics
Hastings Int'l &Comp L R	Hastings International and Comparative Law Review
HKC	Hong Kong Court
HKD	Hong Kong Dollar
HKHC	Hong Kong High Court
HKLJ	Hong Kong Law Journal

HKLR	Hong Kong Law Report
HL	House of Lords
Hofstra L. Rev.	Hofstra Law Review
IAA	International Arbitration Act
IAAF	International Association of Athletics Federations
Ibid.	Ibidem, in the same place
IBLJ	International Business Law Journal
ICC Bulletin	International Chamber of Commerce International Court of Arbitration Bulletin
ICE	Institution of Civil Engineers
ICJ	International Court of Justice
ICJ	Reports International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly.
ICSID Reports	International Centre for the Settlement of Investment Disputes Reports
ICSID Review-FILJ	ICSID Review - Foreign Investment Law Journal
IDR	International Dispute Resolution
<i>i.e.</i>	<i>id est</i> , that is
IECL	International Encyclopedia of Comparative Law
INCOTERMS	ICC International Commercial Terms
Infra.	Below
ILSA J. Int'l & Comp. L.	ILSA Journal of International and Comparative Law
Int. ALR	International Arbitration Law Review
Int'l	International
Int'l Bus Law	International Business Lawyer
Int'l Fin L Rev	International Financial Law Review
Int'l Law	International Lawyer
ILA	International Law Association
ILM	International Legal Materials
ILR	International Law Reports
Iran-US CTR	Iran-US Claims Tribunal Reports

IT	Information Technologies
ILA Final Report	ILA, Conference Report 2000 and Conference Report 2002 on Public Policy in ICA
ITA	International Trade Administration
J./J	Judge
JBL	Journal of Business Law
JCP	Juris-Classeur Périodique, La Semaine Juridique
J Int'l Arb	Journal of International Arbitration
<i>Journal des Tribunaux</i>	(Belgian) <i>Journal des Tribunaux</i>
JPY	Japanese Yen
Juris-Classeur Proc Civ	<i>Juris-Classeur (procédure civile)</i>
JWIT	Journal of World Investment & Trade
KTS	<i>Konkurs-Treuhand und Schiedsgerichtswesen</i>
KRW	Korean Won
Law & Policy in Int'l Bus	Law & Policy in International Business
LDIP	<i>Loi fédéral sur le droit international privé</i>
LIA	Law on International Commercial Arbitration
LJ	Lord Justice of Appeal
LJJ	Lords Justice of Appeal
Lloyd's Rep.	Lloyd's Law Reports
Lloyd's MCLQ	Lloyd's Maritime and Commercial Law Quarterly
LNTS	League of Nations Treaty Series
Louisiana L Rev	Louisiana Law Review
Mealey's IAR	Mealey's International Arbitration Reports
Mich. J. Int'l L.	Michigan Journal of International Law
Minn L Rev	Minnesota Law Review
Model Law	UNCITRAL Model Law on International Commercial Arbitration adopted 21 June 1985
NCPC	Nouveau Code de Procédure Civile (French Code of Civil Procedure)
NE	North East Reporter
Ned Jur	Nederlands Jurisprudentie

Netherlands CCP	Netherlands Code of Civil Procedure
Nev. L. J.	Nevada Law Journal
New L J	New Law Journal
New York Convention	1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards
NJW	Neue Juristische Wochenschrift
No. / no.	Number / number
Nos. / nos.	Numbers / numbers
NSWLR	New South Wales Law Reports
NW J Int'l L & Bus	Northwestern Journal of International Law and Business
NYAD	New York Appellate Division
NYC	New York Convention (Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958)
NYLJ	New York Law Journal
NY L Sch J Int'l & Comp L	New York Law School Journal of International and Comparative Law
Oberlandesgericht	Court of Appeal (Germany)
OGH	Der Oberste Gerichtshof (The Supreme Court of Justice of Austria)
Ohio St. J. on Disp. Resol.	Ohio State Journal on Dispute Resolution
OJ	Official Journal of the European Communities
p. / pp.	page / pages
para. / paras	paragraph / paragraphs
PC	Privy Council
PCIJ	Permanent Court of International Justice
Penn St. L. Rev.	Penn State Law Review
Pepp. Disp. Resol. L.J.	Pepperdine Dispute Resolution Law Journal
PIL	Private International Law
PRC	People Republic of China
Proc.	Procedure

PWC	PriceWaterhouseCoopers
QB	Queen's Bench
QBD	Queen's Bench Division
RabelsZ	<i>Rabels Zeitschrift für ausländisches und internationales Privatrecht</i>
RCADI	<i>Recueil des Cours de l'Académie de Droit International de la Haye</i> / Collected Courses of the Hague Academy of International Law
RDAl/IBLJ	<i>Revue de droit des affaires internationales</i> / International Business Law Journal
Rep.	Report
Rev. arb.	<i>Revue de l'arbitrage</i>
Rev. crit. dip.	<i>Revue critique de droit international privé</i>
RHDI	<i>Revue hellénique de droit international</i>
Riv. dell'arb.	<i>Rivista dell'arbitrato</i>
RIW	<i>Recht der Internationalen Wirtschaft</i>
Rome Convention	EC (Rome) Convention on the Law Applicable to Contractual Obligations 1980
RPS	<i>Recht und Praxis der Schiedsgerichtsbarkeit</i>
RSDIE	<i>Revue Suisse de droit international et de droit européen</i>
RUAA	Revised Uniform Arbitration Act 2000
Rutgers L Rev	Rutgers Law Review
s.	Section
SAR	Stockholm Arbitration Report
SchiedsVZ	<i>Zeitschrift für Schiedsverfahren</i> (German Arbitration Journal)
SchwZIER	<i>Schweizerische Zeitschrift für internationales und europäisches Recht</i>
S Ct	Supreme Court of the United States
SDNY	Southern District of New York
SGD	Singaporean Dollar

SJ	<i>La Semaine Judiciare</i> , Geneva
SLT	Scots Law Times Reports
SLR	Singapore Law Reports
Stan. J. Int'l L.	Stanford Journal of International Law
Subs.	Subsection
Supra.	Above
Swiss PIL	Swiss Private International Law Act of 1987
TAS	<i>Tribunal arbitral du sport</i>
Texas Int'l LJ	Texas International Law Journal
TGI	French Tribunal de Grande Instance
Tulane L Rev	Tulane Law Review
UCC	Uniform Commercial Code
U Cin L Rev	University of Cincinnati Law Review
U Ill L Rev	University of Illinois Law Review
UK	United Kingdom
UKPC	Neutral citation for decisions of the Privy Council
U Miami Inter-Am L Rev	University of Miami Inter-American Law Review
UNCITRAL Notes	UNCITRAL Notes on Organizing Arbitral Proceedings
UNTS	United Nations Treaty Series
US	United States
USA	United States of America
USD	United States Dollar
USSR	Union of Soviet Socialist Republics
v.	versus
Vanderbilt L Rev	Vanderbilt Law Review
VCLT	Vienna Convention on the Law of Treaties
Vol.	Volume
vs.	versus
VSC	Supreme Court of Victoria, Australia
WAMR	World Arbitration and Mediation Report

WAM Rev	World Arbitration and Mediation RevWashington Washington Convention on the Settlement of Investment Convention Disputes between States and Nationals of other States 1965
WL	Westlaw
WLR	The Weekly Law Reports
WM	Wertpapier-Mitteilungen
WTAM	World Trade and Arbitration Materials
WTO	World Trade Organisation
WuB	<i>Entscheidungssammlung zum Wirtschafts- und Bankrecht</i>
Yale LJ	Yale Law Journal
YBCA	Yearbook of Commercial Arbitration
ZBB	<i>Zeitschrift für Bankrecht und Bankwirtschaft</i>
ZfRV	<i>Zeitschrift für Rechtsvergleichung</i>
ZIP	<i>Zeitschrift für Wirtschaftsrecht und Insolvenzpraxis</i>
ZK-IPRG-Name	<i>Zürcher Kommentar zum IPRG</i> (Zurich Commentary) on the Swiss PIL/ author
ZPO	<i>Zivilprozessordnung</i> (German Code of Civil Procedure)
ZVglRwiss	<i>Zeitschrift für vergleichende Rechtswissenschaften</i>

(all Laws and Rules in the list of Abbreviations and in the thesis refer to the ones at present in force)

INTRODUCTION

The use of methods for expediting arbitration has increased in response to concerns over the long delays and excessive cost of arbitration in the current international business environment.¹ Fast-track arbitration (FTA) combines many of these methods in order to achieve advanced speed and economy. Thus, as we will see in this thesis FTA is arbitration where the parties have chosen to adopt an agreement with the specific aims of increasing speed and reducing cost, and where it is understood that the fast-track procedures to achieve these aims may restrict parties' options in other areas of international commercial arbitration (ICA).

This thesis examines whether FTA can effectively improve the speed and economy of international commercial arbitration (ICA) without reducing the traditional characteristics of ICA such as finality, flexibility and enforceability. Thus, the question is whether there is a scope for the wider application of fast-track arbitrations in the resolution of international commercial disputes.

Speed and economy are expected to arise from the parties' elimination and limitation of some of the procedural steps, by comparison to regular arbitration where all procedural steps are normally permitted.² In FTA parties insert time limits or procedural limitations for the conduct of arbitration, for example limited document production, a one-day hearing rather than a full hearing, and short deadlines between procedural steps.³

What makes FTA different from methods of expediting arbitral proceedings which also promise speed and economy in ICA is that many aspects of the FTA process, such as shortened time limits and procedural limitations, are

¹ Queen Mary, U. O. L. S. O. I. A., & White and Case LLP (2012) *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process* London (SIAWC Survey 2012)

² Ulmer (2010) pp. 33-45

³ Kraft (2010)

applied wholly during dispute resolution process.⁴ Whereas, the methods of expediting regular ICA, such as identification by the tribunal of the issues to be determined as soon as possible after constitution or appointing a sole arbitrator, are applied partly depending on the particular circumstances.⁵

This difference means that FTA is more robust and has a more rigid structure for achieving speed.⁶ But ICA is a flexible process where many procedural issues are decided after a dispute has arisen and during the preparation of the dispute resolution mechanism.⁷ Parties can create their own rules about how disputes will be resolved and even pick how many decision makers there will be and how quickly they will be appointed. This freedom is attractive and may even permit international businesses to conduct arbitral proceedings without the constraints of municipal procedural law.⁸

However, adopting an FTA process specifically for promoting speed and economy in ICA may also create practical problems. For instance, comprehensively expediting ICA will reduce both the autonomy and flexibility of international businesses to resolve their disputes in a manner that suits them. Thus, in contrast to regular arbitration proceedings, once they have imposed shortened time limits they cannot easily extend them.⁹

Also FTA will not be beneficial if it results in arbitration awards which are not final and globally enforceable. The New York Convention (NYC) made arbitration awards easily enforceable in most countries throughout the world.¹⁰ International businesses are anxious to conserve litigation costs and focus on their core business but it is doubtful whether FTA awards will be as easily enforced as regular arbitration awards or whether FTA awards will create a

⁴ Glaholt (2008)

⁵ See supra p. 22 note 1 SIAWC Survey of 2012 p.13; infra p. 268 figure 22

⁶ Andreeva (2008)

⁷ Najar (2008)

⁸ Craig (1985) p. 49-81

⁹ Barrington (2009)

¹⁰ Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the New York Convention- of 10 June 1958 (NYC)

streamlined procedure for enforcing parties' rights in many different countries, or whether as a result FTA will achieve significant savings of time and money compared to regular arbitration.¹¹

Of course, parties may agree to FTA which has not been derived from the jurisdictional imprimatur of national legal systems and is not supported by key international conventions. In such an instance, providing the parties manage to convince the tribunal that they will voluntarily agree to the tribunal's decisions, arbitrators may disregard the mandatory requirements of the law and issue an award despite the risk of it being unenforceable. But even this arrangement may lead to argument over whether precedence should be giving to the values of national systems or transnational norms or to party autonomy.¹²

With these practical issues in mind, this thesis will discuss the effectiveness of fast-track procedures by assessing their benefits and disadvantages. This will allow parties to inform themselves about the risk of forsaking the security and certainty offered by ICA in favour of the advantages of speed and reduced cost which FTA appears to offer.

In other words:

Can FTA bring speed and economy without compromising the fundamental values of ICA?

What is reasonable speed and economy in ICA? Although difficult to determine, it is not impossible. Thus, in its 2007 report on *Techniques for Controlling Time and Costs in Arbitration*,¹³ the International Chamber of Commerce (ICC) Commission on Arbitration considers the freedom of parties

¹¹ Davis/Smit/Brown/Affaki/et al. (1994)

¹² Petrochilos (2004)

¹³ *Techniques for Controlling Time and Costs in Arbitration*: Report from the ICC Commission on arbitration, International Chamber of Commerce, Paris: ICC Publication No 843, (ICC Techniques (2007))

to set out fast-track procedures in the arbitration clause.¹⁴ The report draws a distinction between the techniques for controlling time and cost and fast-track procedures. Thus, FTA is only one of the techniques which may be used to achieve speed and economy, depending on the specific nature of the contract and disputes that are likely to arise.¹⁵ The report clearly recommends the parties to tailor their own FTA by picking and mixing among many of the techniques and methods for controlling time and cost.

However, parties' desire for increasing speed and economy needs to be balanced against unfairness and injustice, i.e. where it might conflict with due process, mandatory laws or institutional requirements.¹⁶ Since FTA is more likely to encounter problems with regard to the due process of arbitral proceedings, it is highly possible that a challenging party may try to convince the court or arbitrators that because of these procedures he has been treated unfairly.¹⁷ Although it is becoming more difficult in today's arbitration environment to claim that fast-track procedure is unfair just because it is speedier and cheaper than regular arbitration procedures, such claims may still be justified, especially when considering the difficulty of assessing the suitability of fast-track procedure in the arbitration clause, which is agreed before the dispute has arisen. Thus, it is essential that the quest for speed and economy does not compromise procedural fairness if fast-tracking international commercial dispute resolutions is to achieve results that are as final, binding and enforceable as in regular arbitration.¹⁸

In order to consider whether there is a scope for the wider application of FTA for the resolution of international commercial disputes, this thesis will examine on one hand thoroughness of fast-track procedures in comparison with the

¹⁴ *Ibid.* paras. 6 and 15

¹⁵ *Ibid.*

¹⁶ Giallard (1998) pp. 28-31

¹⁷ Sattar (2010) pp. 51-73

¹⁸ Rovine (1992) pp. 45-57; Davis (1992) pp. 43-50; Verbist (1993) pp. 543-545; Downie (1991) pp. 473-488; Imhoos (1992) p. 135; See further at the special sections of 2 *Am Rev Int'l Arb.* Issue 2 of 1991, and 3 *ICC Bulletin* Issue 2 of 1992; Davis/Ezratty (1992) pp. 141-142; Rovine (1995) pp. 286-288

regular methods of expediting arbitration, and, on the other, the fundamental principles of international arbitration rules, laws and norms. Given that fast-tracking international commercial disputes occurs in so many places and is subject to so many procedural and substantive norms, it is best to identify all relevant rules through case-by-case research, with resort being made to the major treatises, Internet resources and national compendia. Thus the thesis will refer to examples from leading jurisdictions around the world but does not aim to be a reference manual for the FTA rules of all systems or one single system.

This thesis is also not aiming to outline the elements of court procedures that are ancillary to the FTA process. Such procedures include stay of proceedings applications, supportive court-ordered interim relief, court assistance in obtaining evidence abroad and procedural challenges to the FTA during arbitral tribunal is at his place. While these are important in their own right, they are only dealt with where they would impact upon an arbitrator's powers, rights and duties.

The thesis structure is as follows:

Chapter 1 – Speed and Economy During the Development of ICA: Arbitration has long been the preferred method of resolving commercial disputes as, at its best, it is both cheaper and quicker than litigation. However, when the framework for modern international commercial arbitration was established, it was not speed and economy that were paramount but rather finality and enforceability.

Chapter 2 – Concern for Increasing Cost and Length: By the 1980s many international commercial arbitration cases were proving so slow and expensive that the advantages of arbitration were being questioned.

Chapter 3 – Avoiding Cost and Delay: We examine several of the approaches that were tried in the last 30 years to make arbitration faster and cheaper.

Chapter 4 – FTA as a Paradigm: ‘Fast-track arbitration’ was one of these new approaches. In this chapter we examine the defining features of FTA in international commercial dispute resolution.

Chapter 5 – Is there scope for the wider application of FTA: With more than 30 years of fast-tracked international commercial disputes to examine, the thesis can now consider whether there is scope for IFTCA to be used more widely.

Chapter 6 – Conclusion: Having reviewed the evidence this thesis will show that there is no reason why FTA should not be applied more widely to resolving international commercial disputes.

1 SPEED AND ECONOMY DURING THE DEVELOPMENT OF INTERNATIONAL COMMERCIAL ARBITRATION

1.1 Speed and economy as a traditional feature

For thousands of years traders from all civilizations have used arbitration to settle disputes due to its speed and economy.¹⁹ In ancient times, village councils or tribal elders were petitioned to arbitrate.²⁰ In Ancient Greece, under the famous Athenian lawmaker, Solon, disputes were referred to magistrates for quick and cost effective resolution.²¹

At this time, the first step in the arbitral procedure was usually the taking of oaths. In arbitration between Sparta and Megalopolis, the arbitrators were required to take the following oath in which speed was an important part:

*“Every question in the judgement relating to the moneys and boundaries of Apollo I will decide as is true to the best of my belief, nor will I in any wise give false judgements for the sake of favour or friendship or enmity; and the sentence passed in accordance with the judgement I will enforce with the best of my power with all possible speed, and I will make just restoration to the god...”*²²

Speed and economy was also the reason for traders of the Roman colonies to refer their disputes to the Praetor Peregrinus, a commercial judge based in Rome who decided disputes between traders.²³

¹⁹ Hunter (1999) p. 2

²⁰ Born (2011) p. 2

²¹ King/LeForestier (1994) p.40

²² Tod (1913) p. 116

²³ Boardman (1993) pp. 31-32

In medieval Europe there were private courts that achieved speed and economy, by using a body of private commercial rules and principles, such as the Law Merchant, that were distinct from the ordinary law of the land. The merchant courts sat in fairs, markets, seaport towns and most other large centres of commercial activity.²⁴ Merchant courts chose as judges merchants who possessed intimate knowledge of particular commercial practices and techniques. As Mitchell, a historian of the Law Merchant writes:

*“The summary nature of its jurisdiction . . . characterized the Lex Mercatoria. Its justice was prompt . . . and the time within which disputes [had to] be finally settled was narrowly limited.”*²⁵

Maritime merchants, for example, demanded that disputes be settled *“from tide to tide according to the ancient law marine and ancient customs of the sea ... without mixing the law civil with the law maritime.”*²⁶ For the most part, the law merchant was administered in special quasi-judicial courts. There were also the courts set up by the merchants themselves at trade fairs, which administered a law that was uniform throughout Europe, regardless of differences in national laws and languages.

During this period, international disputes revolved on the particulars of the trade and appeared to be settled best by the disputants' peers, merchant-turned-arbitrators, who performed such services without charge or for only token remuneration.²⁷ Sanctions such as ostracism and the boycott of all future trade ensured that traders would be held to the resolution dictated by the arbiters.²⁸ In this way, disputes which otherwise might have damaged the whole industry were settled with a minimum of disruption.²⁹

²⁴ Milgrom/North/Weingast (1990)

²⁵ Mitchell (2011) p.12-13

²⁶ Mitchell (2011) p. 20

²⁷ Mattli (2001) p. 919-947

²⁸ Werner (1998) p. 22

²⁹ Krishnamurthi (1983) pp. 103-142

Another reason for using guild courts was that *“under severest penalties, the guilds forbade members to appeal, in cases where they alone were concerned, to any court save that of the guild.”*³⁰

With the development of international trade the seaports of England, France, Germany and the USA became the venues for many hundreds of arbitrations between foreign parties every year. These were procedurally and jurisprudentially akin to litigation but much quicker and cheaper. However, with the industrial revolution international trade grew rapidly, involving many participants outside the guilds which consequently compromised the sanctions which merchant-turned arbitrators could impose.³¹

To resolve these new type of disputes the foremost jurists and members of the legislative assemblies of Europe and America came together to update the Merchant Law arbitration procedures to fit the needs of modern commerce.³² In the mid-19th century the British Parliament gave arbitration added power by adopting legislation to overturn the English law³³ that arbitration agreements were revocable by the parties and not enforceable by the courts.³⁴ Over the next hundred years other countries took similar steps to advance the enforceability of arbitration agreements and awards, motivated by business groups who lobbied for improved methods of resolving cross-border commercial disputes.³⁵

What was still lacking was a system of commercial arbitration that could cope with the practical difficulties of resolving international disputes and be acceptable and enforceable to merchants of many different countries.³⁶ Between the Jay Treaty in 1794 and the Treaty of Washington in 1871 there

³⁰ Mitchell (2011) p. 42

³¹ Lalive (1998) p. 483

³² Gennadios(1904) p.74

³³ English Arbitration Act of 1697

³⁴ Sayre (1928) pp. 606-607

³⁵ Born (2009) p. 49

³⁶ Lalive (1987) p.272

were many attempts to provide such an arbitration environment but they were mostly unilateral agreements covering only a few nations.³⁷

It was not until 1895 that the development of arbitration law in England allowed the foundation in London of the International Arbitration and Peace Association, which developed into the current London Court of International Arbitration (LCIA), to cover the issues of many nations.³⁸ Its success served as a model for the creation of several international arbitration bodies which still exist including the Stockholm Chamber of Commerce (SCC), based in Stockholm (established in 1917); International Chamber of Commerce (ICC), based in Paris (established in 1919); and American Arbitration Association (AAA), based in New York (established in 1926). These bodies played a crucial role in developing modern mechanisms for international commercial arbitration throughout the 20th Century.³⁹

Whilst there are a large number of arbitral institutions that followed the footsteps of those major institutions, the most important organisations which contributed to the field are: China International Economic and Trade Arbitration Commission (CIETAC), based in Beijing (established in 1956);⁴⁰ United Nations Commission on International Trade (UNCITRAL), based in Vienna (established in 1966);⁴¹ World Intellectual Property Organization (WIPO), based in Geneva (established in 1994);⁴² and Swiss Chambers' Arbitration Institution (SCAI), based on the integration of the Chambers of Commerce and Industry of Basel, Bern, Geneva, Lausanne, Lugano, Neuchâtel and Zurich (joint together in 2004).⁴³

³⁷ Gennadios (1904) pp. 59-69

³⁸ Hunter/Marriott/Veeder (1995) p. 25 *et seq.*

³⁹ Hanotiau (2011) pp. 89-103

⁴⁰ Mistelis (2010) pp. 513-717

⁴¹ Caron/Pellonpää/Caplan (2006)

⁴² Cook/Garcia (2010)

⁴³ Kaufmann-Kohler/Stucki (2004)

1.2 Speed and Economy as an axiom

During the development of modern international commercial arbitration the need for speed and economy was accepted without question.⁴⁴ Arbitration always had been a less formal, quicker, and less expensive way of resolving international disputes, and the emerging institutions were committed to preserving those traditional virtues.⁴⁵

LCIA was the first institution to codify speed and economy of modern arbitration. The priority given to these advantages was clearly stated in a speech to celebrate the opening of LCIA in 1892:

*“This Chamber is to have all the values that the law lacks. It is to be expedient where the law is slow, cheap where the law is costly, simple where the law is technical.”*⁴⁶

The advantages of speed and economy of arbitration continued to be emphasised in the opening ceremonies of ICC in 1922.⁴⁷ Praised by international traders for its effort in promoting arbitration as an efficient way of resolving international commercial disputes, ICC urged that an arbitration clause should be included in all individual business agreements *“to the end that expense and delay incident to litigation may be eliminated, and that commercial arbitration may be adopted speedily in all international trade.”*⁴⁸

At this time, speed and economy were achieved in a variety of ways.⁴⁹ Many arbitration laws, rules and conventions were introduced to make arbitration a predictable and reliable dispute resolution process, which in turn encouraged

⁴⁴ Rivkin (2008) p. 378

⁴⁵ Najjar (1996) p. 368

⁴⁶ Redfern (2008) p. 22 (quoted from Manson (1893) IX L.Q.R 86)

⁴⁷ Hunter/Marriott/Veeder (1995) p.9

⁴⁸ The New York Times of 26 June 1921 (reported from the third congress of the ICC)

⁴⁹ Carter (1998)

commercial parties to add arbitration clauses to their contracts.⁵⁰ Thus, enforcing a court judgment in a foreign country requires separate litigation on the award, which often enquires afresh into the merits of the dispute and is typically more time consuming and costly than enforcing an arbitration award.⁵¹ Since ICA took place in one forum it could save time and money by avoiding the race to the courthouse by parties from two different countries which may also have very different laws.⁵²

To facilitate the time and cost management of the dispute, arbitration institutions took a more active role and established lists of arbitrators who could be relied on to be competent and who could be selected for their specialized knowledge in the field in which the dispute had arisen.⁵³ These arbitrators conducted the procedure in consultation with the parties rather than following the rigid procedures of the courts. In addition, the private nature of arbitration ensured confidentiality to parties who might otherwise find themselves in the glare of public interest.⁵⁴

1.3 Speed and Economy are internationally codified

In 1923, a number of important trading states with the help of ICC negotiated the *Geneva Protocol on Arbitration Clauses in Commercial Matters*.⁵⁵ This was the first step towards creating an effective international legal framework for the enforcement of arbitration agreements and awards. Among other things, it required contracting states to recognize the enforceability of international arbitration agreements,⁵⁶ to enforce arbitral awards made in their

⁵⁰ Helmer (2003) p. 36

⁵¹ Wang (2000) pp. 189-211

⁵² Lander (1995) pp. 167-172

⁵³ Werner (1998) pp. 22-24

⁵⁴ Hunter (2000) pp. 379-392.

⁵⁵ Protocol on Arbitration Clauses Signed at a Meeting of the Assembly of the League of Nations Held on the September 24, 1923 in Geneva. (The Geneva Protocol of 1923)

⁵⁶ *Ibid* Articles I-IV.

own territory,⁵⁷ and to give the parties the autonomy to craft the procedures which would subsequently govern their arbitration.⁵⁸

In 1925, just two years later, the US adopted the first federal statute governing arbitration – the Federal Arbitration Act (FAA)⁵⁹ It was adopted specifically to overturn the hostility of the US courts to arbitration.⁶⁰ The Act was followed with the establishment of the American Arbitration Association (AAA) in 1926.

In 1927, the Geneva Convention for the Execution of Foreign Arbitral Awards supplemented the Geneva Protocol.⁶¹ Where the Geneva Protocol required the enforcement of arbitral awards in the state where the award was made, the new convention required the enforcement of "foreign" arbitral awards within any contracting states.⁶² In addition it prohibited substantive judicial review of the merits of such arbitral awards in recognition proceedings with the term not open to opposition, appeal, or (other recourse) of any kind in that country.⁶³

The Geneva Agreements provided the legal framework for the enforcement of international arbitration agreements and awards for the next thirty years but practical problems remained.⁶⁴ Under the Geneva Convention, the winning parties to arbitrations were required to obtain a leave for enforcement from the courts of the country of origin before they could execute the award overseas time-consuming process known as double exequatur.⁶⁵

⁵⁷ *Ibid* Article III.

⁵⁸ *Ibid* Article II.

⁵⁹ 9 USC. §§1-14 (1925).

⁶⁰ HR Rep No. 68-96, pp. 1-2 (1924).

⁶¹ Convention on the Execution of Foreign Arbitral Awards Signed in Geneva, September 26, 1927 (the Geneva Convention of 1927)

⁶² *Ibid* Article I.

⁶³ *Ibid* Article I. and II.

⁶⁴ Report and Preliminary Draft Convention adopted by the Committee on International Commercial Arbitration at its meeting of 13 March 1953 (ICC Preliminary Draft Convention of 1953)

⁶⁵ Sampliner (1997) p.145

In the US, although the Geneva Agreements were enacted during the same time frame as the FAA, neither the protocol nor the convention was ratified. Instead the US continued to rely on the FAA to govern the enforcement of both domestic and international arbitration agreements and awards in the US courts and continued to rely on bilateral agreements for the enforcement of foreign arbitral awards abroad.⁶⁶ This led to legal disagreements in the USA on the validity of foreign arbitration agreements. In a 1927 article in the Yale Law Journal, one commentator noted that if an arbitration agreement provided for arbitration outside of the US (as was common in maritime transactions), the FAA did not authorize the US courts to enforce the arbitration agreement.⁶⁷ The article noted, however, that the courts would have power to stay any US Litigation under section 3 of the FAA while the foreign arbitration was pending.⁶⁸

By the 1930s, the primary interest in arbitration was not whether cases were cheap and speedy (*the Lena Award of 1930, 202 days*)⁶⁹ or costly and lengthy (*the Radio Corporation of America v. China Award of 1935, 989 days*).⁷⁰ What the international business community needed was to be able to settle disputes with binding results.⁷¹ Only then would they get the kind of justice which would inspire confidence in the trading community and enable the smooth progress of international transactions.⁷²

In 1953, a landmark case highlighted the problems of enforcing international arbitration awards. In *Wilko v. Swan*⁷³ the US Supreme Court held that an arbitration agreement between a securities broker and a buyer was

⁶⁶ Kent (2000) p.114

⁶⁷ Poor (1927) p. 670

⁶⁸ *Ibid*, 670

⁶⁹ Veeder (1998) pp. 747-792 discussing the *Lena Goldfields Co. Ltd. v USSR* (1930) case. See also Veeder (2011)

⁷⁰ *Radio Corporation of America v. The National Government of the Republic of China* (1935) 3 Reports of International Arbitration Awards p. 1627 (Date of Tribunal: 27 June 1932 Date of Award: 13 April 1935.)

⁷¹ Werner (1998) p. 22

⁷² Park (2003) p. 280

⁷³ 346 US 427 (1953) p.438

unenforceable under the Securities Act of 1933. For the first time since the adoption of the FAA in 1925, the USA courts held that certain categories of statutory, public-law claims were incapable of being resolved by arbitration.

As world trade expanded after World War II, the ICC published a report in 1953 in which it collected observations from many countries that were experiencing problems with enforcing international arbitration agreements and awards. The report culminated in a request for the United Nations Economic and Social Council to convene a meeting on the subject of international arbitration.⁷⁴ It was suggested that ICA was open to frequent attacks and did not suit for satisfactory award in terms of time and cost-effectiveness. The best precedent to quote in this respect is *SEEE v. Yugoslavia*⁷⁵ where the dispute, started around 1950, produced an award in 1956 which was subject to so many attacks that—at least until 1990s—the winner did not succeed in enforcing it.

In the spring of 1958, the United Nations hosted a three-week conference in New York, attended by delegates from 45 countries, to consider a new international convention on the enforcement of foreign arbitral awards. That conference resulted in the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the New York Convention (NYC).

The NYC introduced significant improvements over the Geneva Protocol and Convention.⁷⁶ It addressed the enforcement of both arbitration agreements and arbitration awards, broadened the definition of arbitral awards covered, shifted the burden from the party seeking enforcement of an arbitral award to the party resisting enforcement, recognized the parties' autonomy to determine arbitral procedures, the procedural law of the arbitration and the law governing the arbitration agreement, and eliminated the requirement of

⁷⁴ ICC Preliminary Draft Convention of 1953

⁷⁵ *SEEE v. Federal Republic of Yugoslavia*, Court of Appeal, Rouen, France, 13 November 1984, (1986) XI YBCA 491

⁷⁶ Kronke/Nacimientos/et al. (2010)

double exequatur which had required the party seeking enforcement of an arbitral award to first have the award confirmed in the arbitral seat.⁷⁷

Despite these benefits and the pressing need for international agreement to enforce foreign arbitral awards, only 24 of the 45 delegates originally signed the NYC.⁷⁸ At that time, the legal frameworks of NYC were seen too liberal and many countries preferred to remain on the principle of bilateral reciprocity agreement for the recognition and enforcement of foreign arbitration awards.⁷⁹ Over the next twelve years only 16 more countries ratified the Convention.

The advantages of NYC, during 1960s, therefore remained potential until the necessary legal framework can be internationally secured. This legal framework should at the very minimum provide that the commitment to arbitrate is enforceable and that the arbitral decision may be executed in foreign countries, precluding the possibility that a national court has grounds to review the merits of the case.

This was especially true with the countries in transition where the only way arbitrators would see their awards enforced was if they gave courts clear reasons for why an international award had been made between two foreign parties.⁸⁰ The courts would agree with their logic and thus uphold the award.⁸¹ Accordingly, arbitrators gave extra attention to procedural details to boost the confidence in their decisions in various national courts.⁸²

Indeed, during the 1960s only a few per cent of arbitration clauses in international contracts specifically contained provisions to save time and cost.

⁷⁷ Born (2009) pp. 89-101

⁷⁸ Mehren/Tibor/John (1999)

⁷⁹ Kröll/Mistelis/Viscasillas/Rogers (2011)

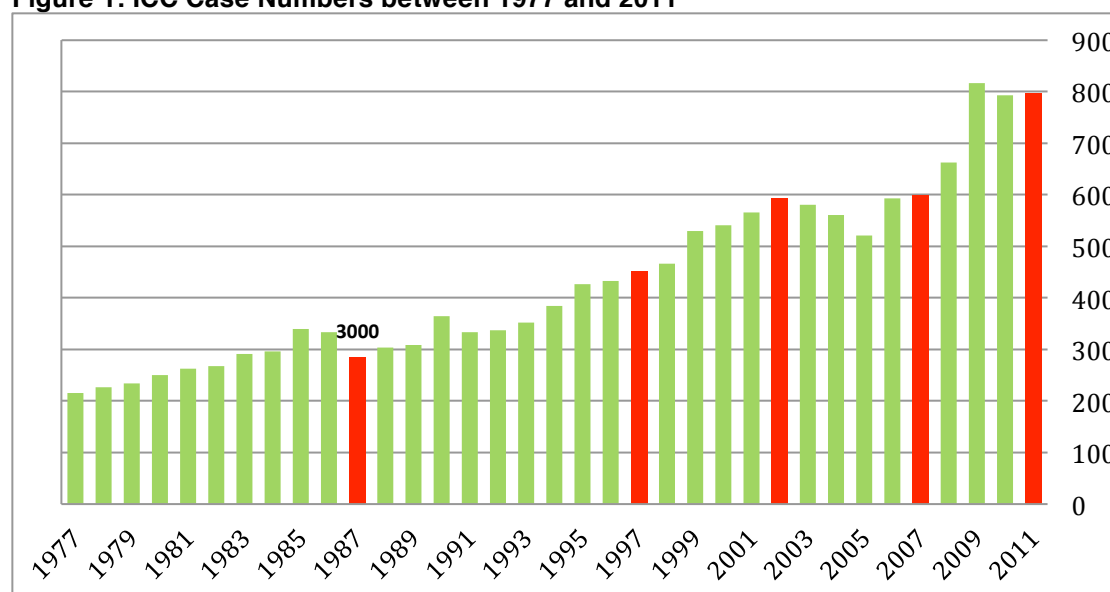
⁸⁰ Helmer (2003) p.35-68 fn.34

⁸¹ Wagoner (1999) p.18

⁸² Born/Miles (2008)

In the 70s and 80s successive GATT Trade Rounds (Dillon Round, Kennedy Round, Tokyo Round, Uruguay Round)⁸³ resulted in steep increases in cross-border trade and investment activities throughout the world.⁸⁴ Emerging markets, such as Russia, China, India and Latin America and new financial products like derivatives and joint ventures, and new business strategies such as franchising and mergers and acquisitions contributed to this rapid increase between 1970 and 1990 as did like intellectual property disputes of WIPO in 90s and the Internet disputes of ICANN in 2000s.⁸⁵ Inevitably, there was a steep increase in the number, size and complexity of the cases submitted to international commercial arbitration.⁸⁶ In the 54 years between 1922 and 1976 the International Chamber of Commerce (ICC), had roughly 3,000 cases filed; it took only 11 years to file the following 3,000.⁸⁷ Thereafter, rapid growth of the number international commercial arbitrations continued.

Figure 1: ICC Case Numbers between 1977 and 2011



Source: ICC Caseload Statistics (Red bars show each time the total increased by 3000 cases)

⁸³ 1960-62, Dillon Round, Reductions in bilateral tariffs. EEC talks begin. 1964-67, Kennedy Round, Reductions in bilateral tariffs. Negotiation rules established. 1973-79, Tokyo Round, Reductions in bilateral tariffs. Procedures on dispute resolution, dumping and licensing, 1986-93, Uruguay Round, Additional tariff reductions. Stalemate for agricultural tariffs and ultimately the establishment of WTO in 1995. See The GATT years: from Havana to Marrakesh at <http://www.wto.org>

⁸⁴ Werner (1998) p.22

⁸⁵ Born/Kent (2006) See also Thornburg (2000) p. 197

⁸⁶ Werner (1998) p. 22

⁸⁷ Jarvin/Derains (1990); Jarvin/Derains (1994) (containing ICC arbitral awards published in the English language between 1974-1985 and 1986-1990).

Pressed by the international business community, several countries who once hesitated to ratify the NYC now reconsidered their decision and became signatories to the Convention.⁸⁸ Thus the US, who abstained from the vote approving the Convention, changed its position in 1970 and acceded to the Convention. Many other countries followed as of today 149 countries are ratified the NYC.⁸⁹

1.3.1 Enforcement of Arbitration Agreements

For the enforcement of an arbitration agreement, the NYC contains internationally uniform provisions; however, it also leaves a number of matters to be determined by national laws.⁹⁰ The most important role is played by the law applicable to the arbitration agreement.⁹¹ Article V (I)(a) of the NYC specifies that the law applicable to the arbitration agreement is *"the law to which the parties have subjected it or, failing any indication thereon, ... the law of the country where the award was made."*⁹²

The Convention also provides for conditions that need to be met by an arbitration agreement. Article II (3) states that a court must refer the parties to arbitration unless the arbitration agreement is *"null and void, inoperative or incapable of being performed"*.⁹³ The words *"incapable of being performed"* would seem to apply to those cases where the arbitration cannot be effectively set into motion. This may happen either where the arbitration clause is too vaguely worded or where other terms of the contract contradict the parties' intention to arbitrate.⁹⁴ However, the possibility of a lack of financial resources

⁸⁸ Kent (2000) p.113

⁸⁹ See Status at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

⁹⁰ Final Report on Public Policy As a Bar to Enforcement of International Arbitral Awards (2000) International Law Association London Conference, Committee On International Commercial Arbitration

⁹¹ Waincymer (2010) p.25

⁹² NYC Article V(1)(a)

⁹³ NYC Article II(3)

⁹⁴ *Nomihold Securities Inc v. Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm); *Elektrim SA v Vivendi Universal SA* [2007] EWHC 571 (Comm), [2007] 2 Lloyd's Rep. 8

to satisfy an award must not be deemed as rendering an arbitration agreement incapable of being performed within the meaning of Article II (3).

Furthermore, the conditions concerning the enforceability of an arbitration agreement are not limited to this phrase.⁹⁵ Article II (3) also states "*an agreement within the meaning of this article*". This phrase incorporates, as conditions for referral to arbitration, three other conditions relating to the arbitration agreement mentioned in first two paragraphs of Article II:⁹⁶

- the difference must arise in respect of a defined legal relationship
- the subject matter of the agreement must be capable of settlement by arbitration
- the arbitration agreement must be in writing

It is obvious that arbitration can take place only if there is a dispute between the parties which has arisen in respect of a defined legal relationship. In other words, the formulation of an arbitration agreement must be sufficiently broad to cover the dispute.⁹⁷ Whether or not a dispute falls under the agreement would appear to be a matter of interpretation.⁹⁸ The courts, however, have resorted to domestic law for resolving the question of whether or not a certain claim comes within the purview of an arbitration agreement.⁹⁹

In 1972, in *M/S Bremen v. Zapata Off-Shore Co.*¹⁰⁰ the US Supreme Court upheld a forum selection clause providing for litigation in a foreign court. The Court's decision demonstrated its acceptance of the realities of globalization

⁹⁵ Royal & Sunalliance Insurance Plc v. BAE Systems (Operations) Ltd, Systems 2001 Asset Trust Funding Ltd, BAE Systems Insurance (Isle of Man) Ltd [2008] EWHC 743 (Comm)

⁹⁶ Fitzpatrick (1983) p. 559

⁹⁷ Note - April 13, 2010, Swiss Federal Tribunal, 4A_582/2009, 2010 Rev Arb 888-890

⁹⁸ Dundas (2011) p. 135-146 See also *Dallah Real Estate & Tourism Holding Co v Pakistan* [2009] EWCA Civ 755, [2010] 2 W.L.R. 805; *Dallah Real Estate & Tourism Holding Co v Pakistan* [2011] 1 All E.R. 485

⁹⁹ *The Rena K* (UK No. 6), Admiralty Court (Queen's Bench Division), 13 January 1978 [1978] 1 Lloyd's L.R. 545; and *V/O Tractor Export, Moscow v. M/S. Tarapore & Company & Anr* (India No. 1), Supreme Court of India, (28 October, 1969), 1 [1970] SCR (3) 53

¹⁰⁰ 407 US 1 (1972) pp. 8-9

and the need for US courts to give effect to dispute resolution provisions in cross-border transactions.

In 1974, in Scherk v. Alberto-Culver¹⁰¹ a US company initiated litigation in a US district court against a German vendor, alleging fraudulent misrepresentation over the sale of a business and asserting claims under US securities laws. The parties' contract contained an arbitral agreement providing for arbitration in Paris under ICC rules and the German company petitioned the US court to enforce the provisions of this agreement.¹⁰² Scherk thus brought into focus the conflict between, on the one hand, the policies underlying the Supreme Court's non-Arbitrability holding in Wilko v. Swan¹⁰³ of 1953 and, on the other hand, the treaty obligation of the NYC (and the pro-arbitration policies of the FAA) as well as the Court's recognition of the needs of international business in M/S Bremen.¹⁰⁴

In Scherk v. Alberto-Culver the Court rejected the precedent of Wilko v. Swan,¹⁰⁵ which involved solely US parties and a dispute involving US property under U.S law and instead placed considerable weight on the fact that the transaction in Scherk was truly international.¹⁰⁶ Citing its decision in M/S Bremen¹⁰⁷ the Court reasoned that the enforcement of international arbitration agreements was critical for the conduct of international business transactions.

Ten years later, in 1985, in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.¹⁰⁸ the Court was confronted with a similar case involving claims under the US antitrust laws. In Mitsubishi Motors, a US distributor asserted claims in a US district court against a Japanese company under the US

¹⁰¹ 417 US 506 (1974)

¹⁰² 417 US 506 (1974) pp. 512-520

¹⁰³ 346 US 427 (1953) p.438

¹⁰⁴ 407 US 1 (1972) pp. 8-9

¹⁰⁵ 346 US 427 (1953) p.438

¹⁰⁶ 417 US 506 (1974) p.515

¹⁰⁷ 407 US 1 (1972) pp. 8-9

¹⁰⁸ 473 US 614 (1985)

antitrust laws.¹⁰⁹ The Japanese company sought to enforce the parties' arbitration agreement, which provided for arbitration in Japan.¹¹⁰ Given that the court acknowledged the importance of the antitrust law to US public policy, the dissenting opinion would have held that an arbitration clause should not normally be construed to cover a statutory remedy that it does not expressly identify thus rejecting the jurisdiction of arbitral tribunal.¹¹¹ The majority disagreed. As in Scherk, the court decided that enforcing arbitration was vital in promoting international commercial transactions.

Article II (1) requires that the arbitration agreement must deal with a subject matter which is capable of settlement by arbitration, i.e., the question of Arbitrability.¹¹² Although the Convention is silent on the issue as to which law should be applied in determining the arbitrability of an agreement, the Mitsubishi Motors verdict encouraged a steady trend towards a more liberal approach to Arbitrability in most countries.¹¹³ Notwithstanding, it must be presumed that—for the enforcement of an arbitration agreement—the law of the country where the enforcement is sought should govern the question.

Today, most claims are arbitrable, at least in the international commercial context.¹¹⁴ For example, in France, a country that has played a large role in the development of international commercial arbitration,¹¹⁵ there is a strong presumption in favour of enforcing arbitration agreements.¹¹⁶ Although the French Civil Code prohibits public entities from entering into arbitration agreements “*in all matters in which public policy is concerned*,”¹¹⁷ the French

¹⁰⁹ 473 US 614 (1985) p.617

¹¹⁰ 473 US 614 (1985) p.629 (The agreement stated that “all disputes, controversies or differences which may arise to stay a lawsuit based on an antitrust claim under the Sherman Act.”)

¹¹¹ Aksen/Dorman (1991) p.65

¹¹² NYC Article II(1), (The Convention does not specify what body of law should govern the Arbitrability question; most courts apply their own domestic law.) For a brief discussion, see Lew/Mistelis/Kröll (2003) pp. 189-192 ¶9-10

¹¹³ Baron/Liniger (2003) p.27

¹¹⁴ Redfern/Hunter (2003) p. 154

¹¹⁵ Carbonneau (2002) p. 781 (discussing French role in development of international commercial arbitration) See also Carbonneau (2006) (discussing the FAA and the USA cases of Arbitrability)

¹¹⁶ Lehmann (2004) p. 774

¹¹⁷ New NCPC of 2011, Article 2060

courts have construed this limitation quite narrowly.¹¹⁸ In practice, the French approach is indistinguishable from *Mitsubishi Motors*.¹¹⁹ Similarly, Germany amended its arbitration law to substantially expand the concept of Arbitrability.¹²⁰ Under the 1998 law, which is modelled on the UNCITRAL Model Arbitration Law, arbitration agreements can extend generally to any claim involving an economic interest.¹²¹

A number of other jurisdictions followed suit demonstrating that broad categories of disputes were arbitrable.¹²² Providing there was no express legislative exclusion of a particular claim or subject matter from arbitration.¹²³ This international consensus was a big step in reducing unnecessary cost and delay.¹²⁴

1.3.2 Enforcement of Arbitral Awards

The decision whether to enforce an award presents a similar choice. The domestic court can defer to the international tribunal and require the parties to comply with the award or ignore the tribunal's ruling and require the parties to litigate in the domestic forum. Contemporary principles favour the international regime. The NYC creates a clear presumption in favour of enforcing awards and many NYC member countries have endorsed this.¹²⁵ Thus, any award made by an arbitral tribunal in a country that has ratified NYC will, theoretically, be enforceable in the courts of all other signatory countries, subject only to certain limited exceptions. By contrast, as we have seen earlier, there is no similar multi-lateral agreement with respect to the recognition and enforcement of court judgments.

¹¹⁸ Honlet (2011) p. 77

¹¹⁹ Movsesian (2007) p. 430

¹²⁰ Baron/Liniger (2003) p. 35

¹²¹ German Arbitration Law of 1998, Article 1030(1)

¹²² Born (2009) pp. 776-787

¹²³ Born (2009) pp. 788-833

¹²⁴ Mustill/Boyd (1989) p. 120

¹²⁵ Redfern/Hunter (1999) p. 460

The underlying provision regarding the enforcement of arbitral awards is Article III of the NYC. In Article IV, the Convention specifies the documents to be supplied by the party seeking recognition or enforcement of an arbitral award.

This article was set up to facilitate the request for enforcement by requiring a minimum of conditions to be fulfilled by the party seeking enforcement. It should be emphasized that the conditions mentioned in Article IV are the only conditions with which the party seeking enforcement of a Convention award has to comply.¹²⁶ It also supersedes any domestic law with respect to conditions.¹²⁷ However, the failure to submit the documents, mentioned in Article IV (1), does not result in the automatic dismissal of the request for enforcement and, rather, may be cured during the proceedings.¹²⁸

The NYC further lays down the grounds under which the court, where the enforcement is sought, may refuse to enforce the award.¹²⁹ The grounds for refusal of enforcement are incorporated in Article V and are divided into two groups: first, the grounds for refusal of enforcement which are to be proven by the respondent;¹³⁰ and second, those which only concern violations of public policy of the law of the forum state (on which the court may refuse enforcement on its own motion).¹³¹ The grounds for refusal mentioned in Article V are exclusive. Enforcement may be refused only if the party against whom the award is invoked is able to prove one of the grounds listed in Article V (1) or if the court finds that the enforcement of the award would violate public policy (Article V (2)).

¹²⁶ Sampliner (1997) pp.141-166

¹²⁷ Lazareff (1996) p. 550 *et seq.*

¹²⁸ OGH, 17 November 1965 (Austria No. 1), referring to Sections 84 and 85 of the Austrian Code of Civil Procedure and Sect. 78 of the Law on Execution, and *Imperial Ethiopian Government v. Baruch Foster Corp.*, *US Court of Appeals* (5th Cir.), 19 July 1976, (US No. 10), 336 n. 4.

¹²⁹ Caprasse (2008) p. 721-741

¹³⁰ Verbist (2008) p. 679

¹³¹ Berg (2007) p. 18 *et seq.*

It should be noted that the opening lines of both the first and the second paragraphs of Article V employ a permissive rather than mandatory language: enforcement "*may be*" refused. For the first paragraph, this means that even if a party against whom the award is invoked proves the existence of one of the grounds to refuse enforcement, the court still has a certain amount of discretion to overrule the defence and to grant enforcement of the award. For the second paragraph, this means that a court may decide that—although the award would violate the domestic public policy of the court's own law—the violation is not such as to prevent enforcement of the award in international relations.

Accordingly, many national laws adopt a pro-arbitration stance.¹³² For example, in countries that have adopted arbitration laws based on the 1985 UNCITRAL Model Law,¹³³ and have thus made it a (part of) domestic law, the enforcement of foreign awards may be achieved on exactly the same bases as under the Convention without any need for reference thereto.¹³⁴ In France, by virtue of the 1981 Decree on International Arbitration, foreign awards are more liberally enforced than under the Convention—and again with no need to make reference to the NYC thereto.¹³⁵ A similar effect has been ascribed to Article 1044 of the German Code of Civil Procedure.¹³⁶ The same is also true of the other twenty-six states that are parties to the 1961 European Convention, all of which at the same time are parties to the NYC. Under the arbitration law of many nations, it is possible to reach the same results in recognition and enforcement of foreign arbitral awards as the NYC.

¹³² Lew/Mistelis/Kröll (2003) p. 687 ¶26-2 (discussing the frequency with which domestic courts enforce international arbitration awards).

¹³³ For comments on the Model Law see Herrmann (1985); Hoellering (1986)

¹³⁴ UNCITRAL Model Law, Articles 34 and 36

¹³⁵ NCPC, Article 1502 (Before 2011 revision)

¹³⁶ Kröll/Heidkamp (2003) p.31

In the United States, the Federal Arbitration Act incorporates Article V's exceptions by reference,¹³⁷ providing that a domestic *"court shall confirm [an] award unless it finds one of the grounds for refusal ... specified in the ... Convention."*¹³⁸

A further main feature of grounds for refusal is that no review of merits of the award is allowed.¹³⁹ This has been affirmed by the courts.¹⁴⁰ In England, for instance, the court's role is narrowly circumscribed: it is limited under Section 68 to intervention in cases of awards where there has been *"serious irregularity"* of one or more specified kinds which the court considers *"has caused or will cause substantial injustice"* to the party challenging the award.¹⁴¹

Although the NYC was never intended to be an overall framework for the conduct of arbitral proceedings, it nevertheless allowed a great leap forward in the effectiveness and efficiency of ICA. Lord Mustill described the success of the NYC as a convention which *"perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law"*¹⁴²

¹³⁷ NYC Article V; see Park/Yanos (2006) pp. 258-59 (reviewing exceptions)

¹³⁸ Born (2011) p 545 (discussing domestic courts' bias in favour of enforcing arbitration agreements).

¹³⁹ Kröll/Heidkamp (2003) p.31

¹⁴⁰ *Eugenio Menaguale v. Intercommerce* (Italy No. 25), Corte di Cassazione (Sez. I), 18 April 1978, No.1842; *Catz International N.V.v.Vaccaro S.p.S.* (Italy No. 30), 2 February 1978, No. 459.

¹⁴¹ Mance (2010) p.119-145

¹⁴² Mustill (1989) p. 43

1.4 Harmonisation of ICA

By the 1990s many national courts were prepared to enforce arbitration agreements and the awards made by arbitration tribunals. The arbitration community were therefore in a position to push for harmonizing the laws in different countries and rules of different arbitral institutions in relation to ICA.¹⁴³

Harmonization provided two major benefits. First, it gave parties a greater level of clarity, certainty and comfort in designing the arbitration process.¹⁴⁴ Second, harmonization increased the ability of arbitration bodies to effectively handle international arbitrations occurring at different locations throughout the world.¹⁴⁵ This enabled arbitration bodies to be equally effective in handling international disputes irrespective of the nationality of the parties.

In the 1970s there was an increasing need for a neutral set of arbitration rules suitable for use in international ad hoc arbitrations to be applicable for small and mid-size disputes which cannot afford the expense institutional arbitration. At that time, there was no guidance for parties and arbitrators wanting to conduct international commercial arbitration outside the institutional arbitration context. The response came with the *United Nations Commission on International Trade Law* (UNCITRAL) Rules of 1976, which covered all aspects of the ad hoc arbitral process. This included providing a model arbitration clause, setting out rules regarding the appointment of arbitrators and to the form of the award.¹⁴⁶

The UNCITRAL Rules were intended to be acceptable in both capitalist and socialist countries, and in common law and civil law jurisdictions.¹⁴⁷ The drafters clearly envisioned a potential conflict between different legal traditions

¹⁴³ Shackelford (2006) p. 897

¹⁴⁴ Ginsburg (2003) p. 1336

¹⁴⁵ Böckstiegel (1999) p. 49-53

¹⁴⁶ Herrmann (1998) p. 49

¹⁴⁷ Rau/Sherman (1995) p. 94

in arbitration and attempted to provide a procedural regime that is acceptable for everyone and flexible enough to make all parties to the dispute comfortable.¹⁴⁸

The UNCITRAL Rules achieved international recognition and were widely adopted in international arbitration practice. The Iran US Claims Tribunal¹⁴⁹ and many bilateral investment treaties applied a modified version of the 1976 rules and free trade agreements of many countries allow investors to pursue UNCITRAL arbitration against a host State to resolve their disputes.¹⁵⁰

In 1983, the International Bar Association adopted '*Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration*' (commonly known as the 'IBA Rules of Evidence'). These rules dealt particularly with practical problems in relation to the evidentiary matters, including the production of documents and the presentation of evidence by witness statement. These Rules were designed to be used in conjunction with institutional or ad hoc arbitration rules or procedures governing international commercial arbitrations.¹⁵¹ They were published "*as a resource to parties and to arbitrators in order to enable them to conduct the evidence phase of international arbitration proceedings in an efficient and economical manner.*"¹⁵² Moreover, they were intended to reflect procedures for the taking of evidence in as many different legal systems as possible. In that way it was hoped that the rules would enjoy the widest possible acceptance and would be particularly useful where the parties come from different legal cultures.¹⁵³

¹⁴⁸ Sanders (1977) p.172. See also Sanders (2004) pp. 243-268

¹⁴⁹ Holtzmann (1995) pp. 39-50

¹⁵⁰ Rau/Sherman (1995) p. 94

¹⁵¹ Commentary on the New IBA Rules of Evidence in International Commercial Arbitration (2000) p.3

¹⁵² IBA Rules of Evidence in International Commercial Arbitration (1999) Preamble para. 1

¹⁵³ Kühner (2010) p. 667

In 1985, a further historical landmark came with the UNCITRAL Model Law on Arbitration (the Model Law).¹⁵⁴ This gained widespread acceptance by the international arbitration community and 66 countries have now adopted the Model Law as their arbitration legislation.¹⁵⁵ In addition, many other countries that have not adopted it outright have based their arbitration laws upon it.¹⁵⁶ For instance, England did not adopt the Model Law but many provisions of the 1996 English Arbitration Act showed that the legislator has taken it into account.¹⁵⁷ The importance of the Model Law in ICA is clearly described by the authors of Redfern and Hunter on International Arbitration:

*“If the New York Convention propelled international arbitration onto the world stage, the Model Law made it a star, with appearances in States across the world.”*¹⁵⁸

The Model Law is a uniform set of ad hoc rules which represents a sort of international consensus on the regulation and conduct of international commercial arbitration.¹⁵⁹ Prior to UNCITRAL, if parties were not going to use an arbitral institution, they were forced to devise their own rules. This requires the full participation of both parties in drafting rules for incorporation into the initial contract, or in determining the rules for arbitration after the dispute arises. Alternatively, parties could allow the arbitrator to establish rules after the process has begun. The Model Law offered a third option which essentially replaced the arbitral institution's procedure by providing a framework for arbitral proceedings when the parties have failed to specify the procedure.¹⁶⁰

¹⁵⁴ UNCITRAL Model Law

¹⁵⁵ Status 1985 - UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006 available at <http://www.uncitral.org>

¹⁵⁶ Herrmann (1999) p. 212 (While deviations have been rare, most national enactments have added provisions on issues not addressed by the UNCITRAL Model Law)

¹⁵⁷ Sanders (1999) p. 31

¹⁵⁸ Blackaby/Partasides/Redfern/Hunter (2009) p. 76

¹⁵⁹ Kerr (1987) p. 129

¹⁶⁰ Carter (1994) p. 788

The Model Law achieved this without strict rules regarding procedures such as document production, cross-examination, or documentary evidence; rather the Model Law endorsed the two core principles: party autonomy in the arbitration process and limited court intervention.¹⁶¹

1.4.1 Party Autonomy

Within the limits of the law, parties can agree to be bound by whatever rules they choose regarding the conduct of the arbitration.¹⁶² Article 19 of the UNCITRAL Model Law provides that subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings. The parties are given the freedom to determine the language of the proceedings,¹⁶³ the law governing the substance of the dispute,¹⁶⁴ the appointment procedure¹⁶⁵ and the place of arbitration.¹⁶⁶

This principle has been enshrined in many national laws and endorsed by international arbitral institutions and organisations¹⁶⁷ Thus, the parties can designate the number of arbitrators, their qualifications and matters relevant to the procedure to be followed. They can prescribe time limits and can, for example, stipulate that an award must be handed down within a prescribed time. Further, the parties may choose to have oral hearings or a documents only arbitration,¹⁶⁸ and include their own rules regarding the use of experts.¹⁶⁹ After the arbitration agreement has been concluded, and before an arbitration has been commenced, the parties are free to modify their agreement in any way they deem fit. They can alter the number of arbitrators, the procedure for

¹⁶¹ Lynch (2003) p. 226

¹⁶² Lew/Mistelis/Kröll (2003) p.28 ¶ 2-45

¹⁶³ UNCITRAL Model Law, Article 22

¹⁶⁴ UNCITRAL Model Law, Article 28

¹⁶⁵ UNCITRAL Model Law, Article 11(2)

¹⁶⁶ UNCITRAL Model Law, Article 20

¹⁶⁷ Vasani/Tallent (2006) p. 257

¹⁶⁸ UNCITRAL Model Law, Article 24

¹⁶⁹ UNCITRAL Model Law, Article 26

the appointment of arbitrators and other matters which they may have previously agreed upon such as the sequence of pleadings and time limits.¹⁷⁰

1.4.2 Limited Court Intervention

Most significantly, Article 5 of UNCITRAL Model Law provides that *“in matters governed by this Law, no court shall intervene except where so provided in this Law.”*¹⁷¹ This provision is crucial because it operates to prevent national courts from relying on any residual bases under local law to intervene in the arbitral process, which would seriously compromise party autonomy and increase cost and delay of arbitration.¹⁷²

1.4.3 The growth of Institutions

The growth in international arbitration would not have been possible without the pioneering work of the world's eminent arbitral institutions.¹⁷³ As Redfern and Hunter have noted, *“an established and well-organized arbitral institution can do much to ensure the smooth progress of an international commercial arbitration, even if the parties themselves—or their legal advisers—have little or no practical experience in the field.”*¹⁷⁴

The last 25 years has seen a big increase in the number of institutions providing arbitration services.¹⁷⁵ In addition to distinguished arbitration institutions, many regional organisations have become popular. For instance, in 1985 the Hong Kong International Arbitration Centre (HKIAC) was established, followed in 1991 by the Singapore International Arbitration Centre (SIAC). Both have become widely used in the Asia-Pacific region.

¹⁷⁰ Fischer/Haydock (1996) pp. 941-988

¹⁷¹ UNCITRAL Model Law, Article 5

¹⁷² Lew/Mistelis/Kröll (2003) p.28 ¶ 2-45

¹⁷³ Hacking/Schneider (1998) p. 27

¹⁷⁴ Hunter/Redfern (1991) p. 255

¹⁷⁵ Hanotiau (2011) pp. 89-103

In 2008 the ICC set up a branch of its Secretariat in Hong Kong and in Singapore. In the same year the LCIA and the Dubai International Financial Centre jointly created a centre in Dubai, known as DIFC-LCIA. A year later the LCIA also set up a satellite branch in India, known as LCIA India. More recently, in 2010, AAA and Bahrain Chamber of Dispute Resolution jointly created the AAA's Bahrain branch in the Gulf.

The proliferation of arbitral institutions throughout the world has created a degree of competition and many are striving to be more successful by resolving greater numbers of disputes and by promoting quicker and cheaper arbitration.¹⁷⁶ On one hand, this is beneficial for international parties because arbitration becomes more accessible and each regional centre comes with arbitration friendly national legislation.

However, this resulted in arbitral centres that are exact copies of one another creating unnecessary competition.¹⁷⁷ Whenever one of the major arbitration centres introduces new rules others follow suit. When SCIA published its expedited rules in 2004, the Hong Kong International Arbitration Centre (HKCIA) and the Singapore International Arbitration Centre re-modelled theirs. Similarly, the World Intellectual Property Organization's (WIPO) separate fast-track arbitration rules were copied by the Arbitration Institute of the Finland Chamber of Commerce (FCC), and the Stockholm Chamber of Commerce (SCC). In 2009 the international division of the AAA, the International Centre for Dispute Resolution (ICDR), created provisions for parties to request emergency relief before the establishment of the main arbitral tribunal.¹⁷⁸ Many institutions followed suit with similar rules like the SIAC Article 26 (2010), the ICC Article 29 (2012) and the SCIA Article 43 (2012).¹⁷⁹

¹⁷⁶ Lalive (1995) pp. 49-67

¹⁷⁷ Lalive (1994) pp.213-219

¹⁷⁸ AAA/ICDR International Arbitration Rules of 2009, Article 37

¹⁷⁹ Falk (2010) p.11

Before such global competition between arbitral institutions, each major institution had its own arbitration rules and procedures which were considerably influenced by the arbitration law and practice of its seat.¹⁸⁰ Thus the LCIA, located in London, has been particularly influenced by the English Arbitration Acts and the Common Law.¹⁸¹ The ICC in Paris enjoys long-standing favour to ICA it has been provided by French Arbitration Law. And WIPO and the Court of Arbitration for Sport (CAS), located in Switzerland, have developed in response to specific industries such as information technology and sport.¹⁸²

Today there are no such clear divisions and rules 'cross-pollinate' between organisations. The same transfer occurs between domestic and international arbitration institutions. For example, the Drafting Committee for the Revised Uniform Arbitration Act (RUAA), which is intended to be a model for US state legislation regarding domestic arbitration, expressly acknowledged that it "*utilized provisions of the UNCITRAL Model Law, the New York Convention, and the 1996 English Arbitration Act as sources of statutory language for the RUAA.*"¹⁸³ Similarly, the AAA/ICDR International Arbitration Rules are modelled primarily on the UNCITRAL Arbitration Rules.¹⁸⁴

International arbitration has also benefitted from domestic arbitration rules. Ten years after the Arbitration Bar Associations (ABA) and the AAA devised a joint Code of Ethics for Arbitrators in Commercial Disputes, the International Bar Association (IBA) adopted its own Rules of Ethics for International Arbitrators, reflecting many of the same principles as the AAA/ABA Code.¹⁸⁵

¹⁸⁰ Wetter (1995) pp. 85-106

¹⁸¹ English Arbitration Act of 1996, Sections 3, 4(3), 44(5) and 44(6); LCIA Rules, Article 16

¹⁸² Schultz (2006)

¹⁸³ Born (2009) p. 161

¹⁸⁴ UNCITRAL Arbitration Rules of 1976, See also recently revised UNCITRAL Rules

¹⁸⁵ AAA/ABA's Code of Ethics for Arbitrators in Commercial Disputes of 2004

1.4.4 Has harmonization gone too far?

In 1996, there was a discussion in the 7th the International Congress for Commercial Arbitrators (ICCA) Congress¹⁸⁶ about UNCITRAL's *Draft Directives for Preparatory Conferences in Arbitral Proceedings* which then became the *UNCITRAL Notes on Organizing Arbitral Proceedings*.¹⁸⁷ The notes were created to provide guidance on prehearing preparation procedures in ICA and were intended to be of great help to practitioners with relatively limited experience in international arbitration. However, they were strongly criticized by arbitration practitioners during the 1996 Congress. In an article entitled *De la fureur réglementaire*, Holtzman quoted from Lalive when he asked:¹⁸⁸

*"Is it not time to redefine priorities and to react against the public and private mania of wanting to regulate down to the very last detail?"*¹⁸⁹

Fouchard also vigorously criticized the first draft of the UNCITRAL text,¹⁹⁰ especially with respect to the attempt of codification and the limitation of flexibility:

*"if too many interests or prejudices conflict to make [arbitration] simpler, at least save what makes arbitration flexible."*¹⁹¹

¹⁸⁶ Holtzmann (1996) pp. 173-194

¹⁸⁷ Ceccon (1997) pp.67-85

¹⁸⁸ Lalive (1994) p. 213-219

¹⁸⁹ Lalive (1994) p. 213

¹⁹⁰ Fouchard (1994) pp. 461-478

¹⁹¹ Holtzmann (1996) pp. 173-194

1.5 Concluding Remarks

This brief summary of the development of international commercial arbitration shows that the priority given to speed and economy has changed over time. In the last century making arbitration agreement and awards enforceable considered more important than improving the speed and economy of arbitration. Today, as a result of the proliferation of arbitration institutions, establishment of legal frameworks for international arbitration, and the harmonisation of arbitration proceedings, ICA is more readily available. Hence they facilitated the growth of ICA.

Indeed, the harmonization of ICA cannot be enough without the increased role of the NYC, and arbitration friendly court decisions which correctly interpreted the UNCITRAL Model Law and subsequent modern arbitration legislation like the English Arbitration Act (1996). The cross-pollination of rules, codes and guidelines between institutions resulted in arbitration being applicable to many different circumstances. Today, ICA has become the norm in the resolution of international commercial arbitration and 90% of all international commercial transactions contain arbitration clauses.¹⁹² Hence arbitration awards are final, binding and widely enforceable in the global scale.

¹⁹² Berger (1993) p. 8 n. 62

2 CONCERNS FOR EXCESSIVE COST AND DELAY IN ICA

In the past 30 years, ICA has become increasingly effective and popular due to the successful establishment of an international arbitration framework.¹⁹³ The end result is that, today, there is no doubt about the severability of arbitration agreements and the enforceability of international arbitral awards for regular arbitration proceedings. Indeed, arbitration, with its flexibility, finality and global enforceability has appeared to be the only game in town for the resolution of international commercial disputes.¹⁹⁴

But while ICA has gained considerable approval from both international businesses and arbitration communities, time and cost saving features have not merited such admiration.¹⁹⁵ The excessive time taken between filing a request for arbitration and the award being rendered, along with the attendant expense, has increasingly become the major criticism levelled against ICA.¹⁹⁶

The 2010 SIA/WC international arbitration survey asked corporate counsel from leading corporations around the world to comment on the reasons for slowness and expense in ICA.¹⁹⁷ The study asked respondents to indicate, from a list of factors which may have an impact on the length of arbitral proceedings, which they considered the most significant. They identified that before the establishment of arbitral tribunal the main factors were: lack of skilled arbitration practitioners (either parties' counsel and arbitrators), dilatory tactics, and the constitution of the arbitral tribunal. After the arbitrators were selected the main factors which contribute to cost and delay were identified as: unsuitable procedural conduct during disclosure of documents, written

¹⁹³ Böckstiegel (2009) pp. 181-187

¹⁹⁴ Landau (2007) pp. 282-297

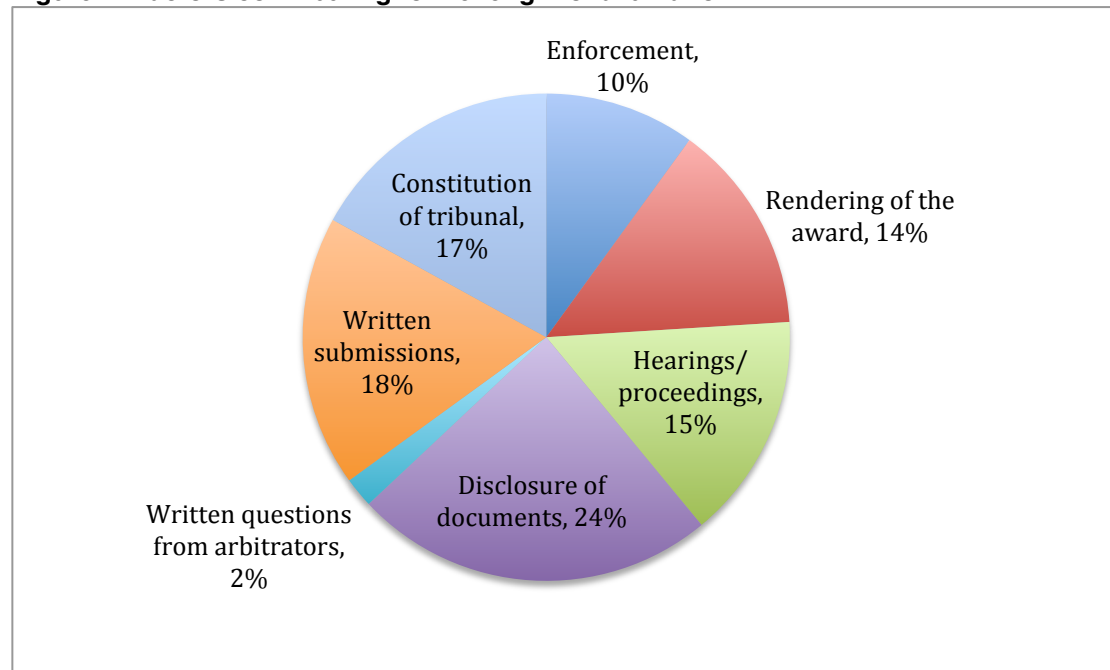
¹⁹⁵ Horvath (2011) p. 252

¹⁹⁶ School of International Arbitration (Queen Mary, U.O.L.) & PricewaterhouseCoopers, *International arbitration: corporate attitudes and practices 2006*, PricewaterhouseCoopers, London, (the SIA/PWC Survey 2006) p. 2 ("Expense and the length of time to resolve disputes are the two most commonly cited disadvantages of international arbitration"), 6, 7, 19, 20

¹⁹⁷ School of International Arbitration (Queen Mary, UOL) & White Case LLP, *International arbitration survey 2010: Choices in international arbitration*, (the SIA/WC Survey 2010)

submissions and the conduct of hearings.¹⁹⁸ Notably, the time for the written arbitrators' questions contributed very little to the cost and delay of ICA. Other smaller contributing factors included late rendering of the award after the final hearings and the time required for enforcement.¹⁹⁹

Figure 2: Factors contributing to the length of arbitration



Source: SIA/WC International Arbitration Survey 2010

These results suggest that the long delays of arbitral proceedings are not inherent to the nature of international commercial arbitration but due to proceedings being conducted in a manner which leads to time and delay.²⁰⁰

The delay produced by arbitrators' written questions was identified as the lowest contributing factor. This may indicate that in the eyes of corporate counsel arbitrators are conscientious about reducing delay and effectively manage procedural questions or it may suggest arbitrators simply ask few question during the pre-hearing stage.²⁰¹

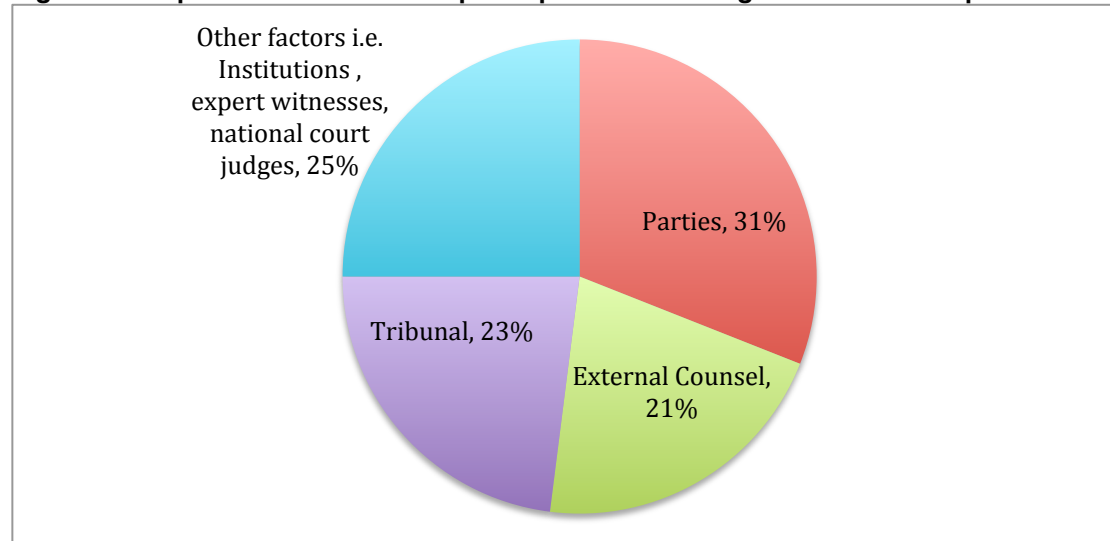
¹⁹⁸ SIA/WC Survey (2010) p.32 Chart 30 See also Brubaker/Templeman (2010)

¹⁹⁹ SIA/WC Survey (2010) (The study showed that, this period usually exceeds twelve months, while the reasonable required time for this procedural stage should not exceed between three and six months.)

²⁰⁰ Brubaker/Templeman (2010) pp. 1-6

²⁰¹ *Ibid*

Figure 3: Proportional share of the participants to the length of the arbitral process



Source: SIA/WC International Arbitration Survey 2010

The survey also revealed that the parties contribute most to delay in the proceedings, followed by the tribunal and external counsel.²⁰² The result shows that the length of the arbitral process to a large degree is the direct result of the behaviour of the parties or their advisers. Given that the service providers of arbitration are responsible for a high proportion of delay, a mindful corporate counsel will be keen to choose the right external counsel and to collect information from arbitral institutions regarding arbitrators' performance and availability and thereby to select more efficient arbitrators and arbitral institutions.²⁰³ Significantly, many corporate counsel in the interview section of the survey believed that *"ICA must become more streamlined and disciplined to provide an entirely effective form of dispute resolution."*²⁰⁴

In the light of these findings this chapter examines why ICA became slow and expensive despite the successful legalization, harmonization and global expansion of ICA. It also examines to what extent international business communities are satisfied with the speed and economy currently offered by ICA.

²⁰² SIA/WC Survey (2010) p.32

²⁰³ Friedland/Ottolenghi (2008) p. 447

²⁰⁴ Brubaker/Templeman (2010) p. 5

2.1 Excessive length of arbitration

The developing ICA framework reshuffled the fundamental values of ICA. Thus, the benefits of finality and enforceability outweighed the value of speedy and economic dispute resolution. But, by the end of the 1980s, in an environment of economic recession and its attendant cash flow difficulties, worries about the disproportionate costs and delays in international arbitration started to surface.²⁰⁵

In 1987, Rubino complained “*a duration of three years, which is quite frequent in large international arbitrations, is unacceptable in and of itself.*”²⁰⁶ 25 years later, the length of arbitration is still a big concern. In 2010, Schroeder, a member of the Corporate Counsel of International Arbitration Group (CCIAG), claimed that no one he knew who uses arbitration regularly was happy with its speed of resolving international commercial disputes.²⁰⁷ That year McIlwrath & Savage reported the time taken to reach an award in an international commercial arbitration was in the region of one to two years, and often longer.²⁰⁸ These figures are similar to the findings of Rubino (1987),²⁰⁹ McIlwrath & Savage (2009)²¹⁰ and Born (2010)²¹¹ who reported that international commercial arbitration took between 18 and 36 months to complete. These figures reveal that there has been no significant reduction in the length of ICA over the past 25 years.

²⁰⁵ Redfern/Hunter (2004) ¶6-43

²⁰⁶ Rubino-Sammartano (1987) p. 75

²⁰⁷ Hechler (2010) This contrasts with the findings in the School of International Arbitration (Queen Mary, U.O.L.) & PricewaterhouseCoopers, *International arbitration: Corporate attitudes and practices 2008*, PricewaterhouseCoopers, London, (the SIAPWC Survey 2008) in which 86 per cent of participating corporate counsel said they were satisfied with international arbitration, although the survey recognised that the time and cost of international arbitration were viewed as disadvantages.

²⁰⁸ McIlwrath/Savage (2010) p.225; Born (2010) p. 6

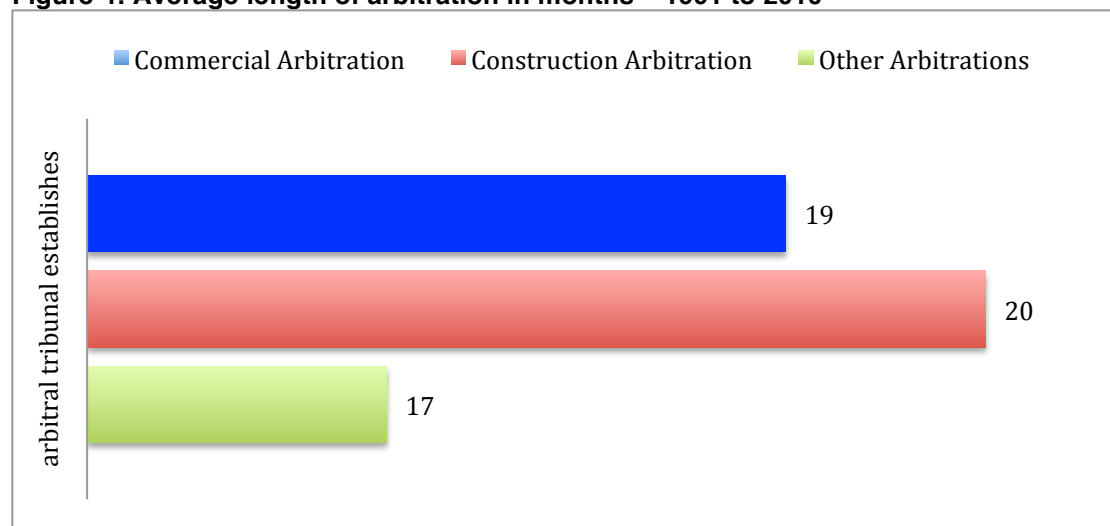
²⁰⁹ Rubino-Sammartano, M. (1987) pp. 75-80 p. 75

²¹⁰ McIlwrath (2009)

²¹¹ Born (2010) pp.6-7

Thus, in the *Costs in International Arbitration Survey 2011*,²¹² participants were asked to provide information on the duration of the arbitration in order to determine whether there was a link between the common costs incurred by the parties and the length of the arbitral proceeding. The results from 254 international arbitrations conducted between 1991 and 2010 showed that the average length of commercial arbitration was 19 months from the establishment of the arbitral tribunal to the rendering of the award.²¹³ Construction arbitrations took 1 month longer while other arbitrations such as Shipping & Maritime, Oil & Gas, and IP & Technology were 2 months shorter.

Figure 4: Average length of arbitration in months – 1991 to 2010



Source: CI Arb Survey 2011 p. 3 and 12.

Even though the CI Arb Survey results did not clearly demonstrate a link between length of arbitration and the cost incurred, it confirmed that the length of arbitration affects some of the common costs.²¹⁴ Such costs are often caused by unnecessarily long and complicated proceedings with unfocused requests for time extensions of the procedural deadlines, requiring a disclosure of unrelated documents and submitting unnecessary witness statements and expert evidence.²¹⁵

²¹² Chartered Institute of Arbitrators (CI Arb) 2011 Costs of international arbitration survey (CI Arb Survey 2011)

²¹³ CI Arb Survey 2011 p.12

²¹⁴ Ibid

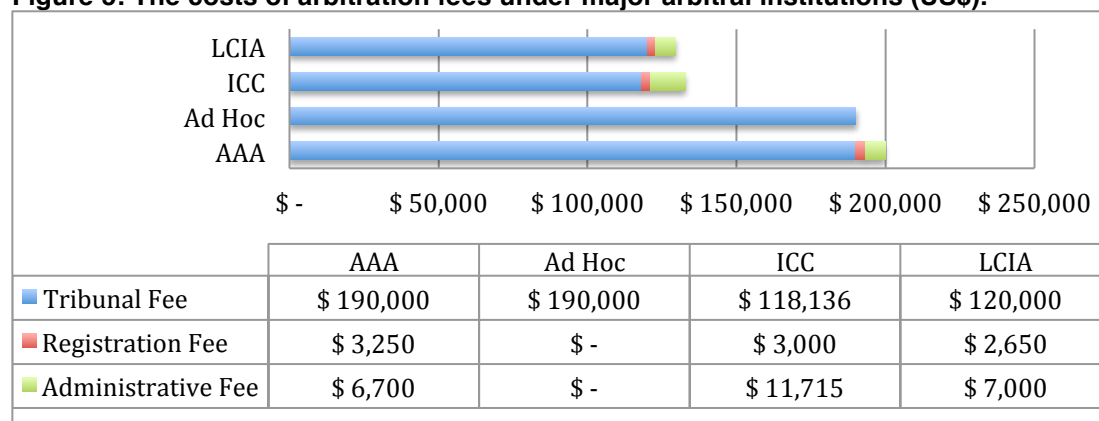
²¹⁵ Sachs (2006) pp. 103-115

In many industries such as mergers and acquisitions, sports, international finance and price determination, speed is a major characteristic of the business and it is vital that disputes should be settled quickly.²¹⁶ But on many occasions international commercial arbitration has failed to provide those industries with the speed they require.²¹⁷

2.2 Excessive cost of arbitration

Although it is understandable that rapid arbitral proceedings may endanger the fundamental values of flexibility, finality and enforceability, this does not justify excessive cost to protect these fundamental features. Nevertheless, the average cost of ICA is now £1.5m.²¹⁸ Unlike litigation, which is subsidized by governments through the provision of their courts, in arbitration the parties bear the full costs of the process.²¹⁹ These costs have three main components: administrative fees charged by the arbitration institutions; fees charged by the arbitrator or arbitrators; and parties cost of paying external legal fees for the presentation of their case.²²⁰

Figure 5: The costs of arbitration fees under major arbitral institutions (US\$).



Source: Fee Scales of AAA, ICC and LCIA. Walker's cost report for Ad Hoc

²¹⁶ Schneider/Kuner (1997) pp. 5-38 (gives examples from electronic commerce)

²¹⁷ Arias (2010)

²¹⁸ CIArb Survey 2011 p. 10

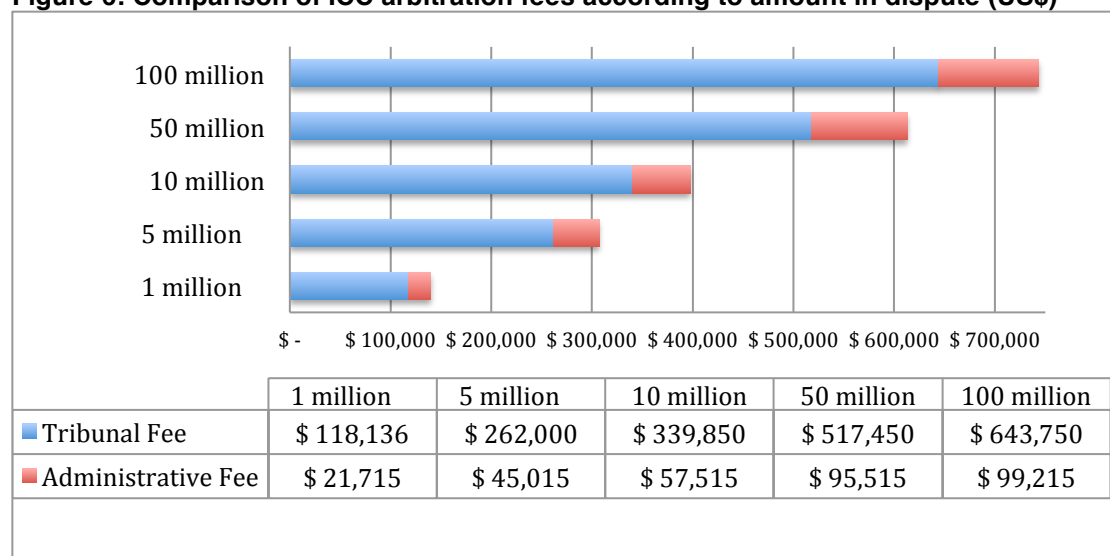
²¹⁹ Drahozal (2007) p.816 fn. 11 (quoting from the vice president of the AAA, India Johnson, "It's a private service provided on an individual basis and paid for case-by-case.")

²²⁰ *Ibid*

Figure 5 above shows the costs for using various institutions.²²¹ As an example of what a party might pay in arbitral fees, let us assume that the dispute is for a sum of US\$1 million. It takes a three-members tribunal one week to deal with procedural matters and one week for the substantive hearing. The arbitral institution involved takes 20 hours of administrative time to deal with the case.

For this particular imagined dispute, the ICC or the LCIA are the least costly choices in terms of the tribunal fee and the institutional cost of arbitration. But as the value of a dispute increases, so do the fees for institutional arbitration, as they are decided on an ad valorem basis. The table below shows how ICC arbitration fees increase depending on the amount in dispute.²²² The LCIA and SCC and SCAI also use similar sliding scales to estimate the advance cost of arbitration.²²³

Figure 6: Comparison of ICC arbitration fees according to amount in dispute (US\$)



Source: ICC's Fee Calculator

²²¹ Based on an estimation of 2-weeks in three-members tribunal time and 20 hours administrative support. See also Arbitral institutions fees: a comparative table, Practical Law Company (PLC) at <http://dispute.practicallaw.com/5-384-0577>

²²² ICC's Fee Calculator (last visited on 15 January 2013) (These figures are average figures and do not include additional expenses for travel and accommodation where a party appoints a foreigner. These expenses are borne by the party)

²²³ LCIA Rules, Article 28 and Annex I; SCC FTA Rules, Article 44 and Appendix III; SCAI Rules, Article 41 and Appendix B

Institutions publish scales of administrative expenses and arbitrators' fees so it is easy to see what parties to have their dispute arbitrated by a particular institution. However, parties often choose the arbitral forum at the time of contract, when they are generally not able to anticipate the value of any dispute which may arise.²²⁴ They may discover to their cost that the chosen institution may be a good choice for low value disputes but not for high value disputes, or vice versa.²²⁵

To avoid administration fees, parties may opt for ad hoc arbitration but this does not always produce an ultimate cost benefit.²²⁶ First, the arbitration fees are not known in advance under ad hoc arbitrations unless parties name their arbitrators and make a fee-arrangement before the dispute.²²⁷ In general, parties name their arbitrators after the dispute and arrange their fees while they are disputes with each other. Second, the arbitral administration provided by an institution generally justifies the administrative fees.²²⁸ The institution will appoint an arbitrator if a party fails or refuses to do so and it will decide upon challenges against an arbitrator. The arbitrators' fees are determined by the institution in accordance with its rules which relieves the parties of the need to negotiate directly with the arbitrators on this delicate subject. Third, the institutions provide support and assistance on dealing with administrative matters which will otherwise require the attention of arbitral tribunal. Finally, under the ICC Rules of Arbitration, a draft award is subject to scrutiny by the ICC, which can require changes in the award's form and draw the arbitrators' attention to matters of substance.²²⁹ This will increase the enforceability of awards as compared to ad-hoc arbitral awards which do not pass any control prior to the resource to courts for the refusal of enforcement.²³⁰

²²⁴ Zykin (2010) p. 607

²²⁵ Hanessian/Hayden/Muniz (2012) p.10

²²⁶ Sussman/Underwood (2011) p.22

²²⁷ Paulsson/Rawding/Reed (2010) pp. 57-79

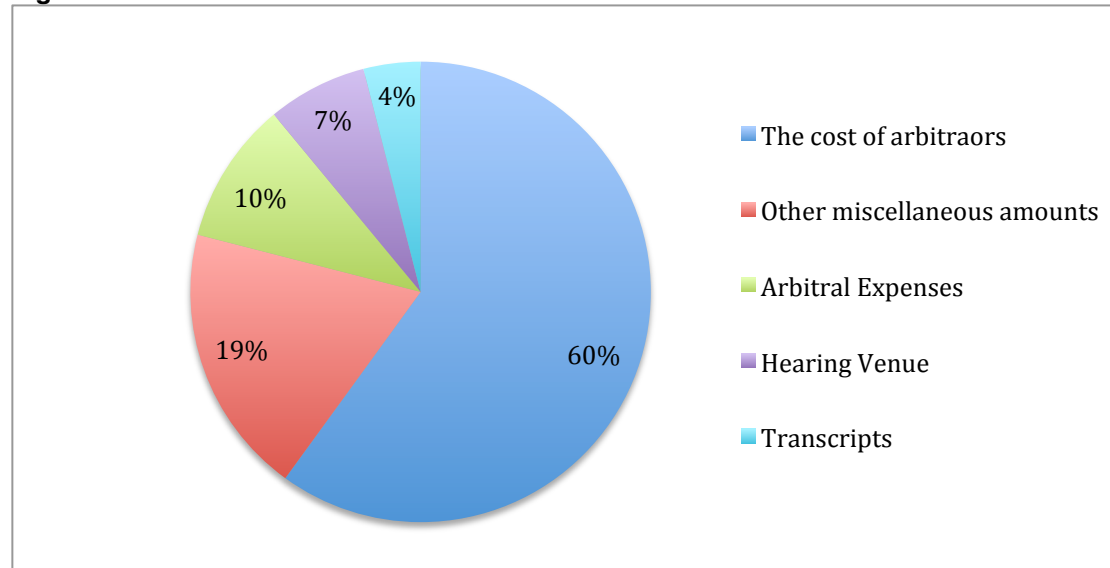
²²⁸ Hacking/Schneider (1998)

²²⁹ ICC Rules, Article 33

²³⁰ Born (2001) p.11 (stating that more structure and predictability may help reduce risks of breakdown between parties and technical defects in award, and credibility increases likelihood that award will be accepted and judicially enforced).

These benefits should not be underestimated. An ad hoc arbitration may well take significantly longer without the administrative support of the arbitral institution.²³¹

Figure 7: Cost allocation of arbitration fees in ad hoc



Source: CIArb Survey 2011 p.11 Chart 14 Common Cost Allocation

Even more expensive than the institutional cost and the arbitrators fees are the party costs covering external arbitration fees for the presentation of their case.²³² In a very thoughtful study published in 2007 the ICC Commission on Arbitration looked at all cases which went to a final award in 2003 and 2004 and found on average, the costs in these ICC arbitration cases were spread as follows:²³³

- 82% Costs borne by parties to present their cases: (including, as the case may be, lawyers' fees and expenses, expenses related to witness and expert evidence, and other costs incurred by the parties for the arbitration other than those set forth below)
- 16% Arbitrators' fees and expenses.
- 2% Administrative expenses of ICC.

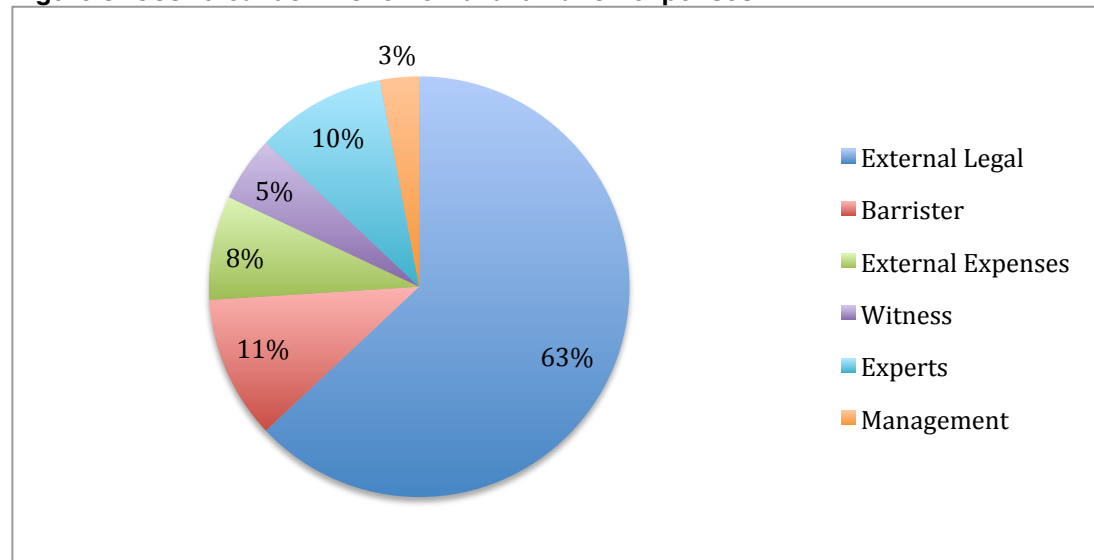
²³¹ Fiebinger/Gregorich (2008) p. 237-254

²³² Bedard (2009) p. 74

²³³ ICC Techniques (2007) Appendix 4.3

In 2011 CIArb survey the cost breakdown borne parties for the presentation of their case showed external legal expenses (including the cost of hiring a barrister) as a dominant cost factor followed by the cost of witness and expert reports, external expenses like the hire of rooms for the hearing, travel and accommodation, and other management costs.²³⁴

Figure 8: Cost breakdown of external arbitration expenses



Source: CIArb Survey 2011 p.10 Chart 12 What did they spend on it?

It follows from both reports that if the overall costs of the arbitral proceedings is to be minimized, special emphasis needs to be placed on steps aimed at reducing the costs connected with the parties external cost for the presentation of their case. As Morton clarified in 2010 that the length and cost of arbitration can directly be correlated with the parties presentation of their case:

“The longer a process takes, the more it is likely to cost. It is a regrettable fact of life that if, for example, counsel are given two weeks from the close of the hearing to prepare written closing submissions, they will fill (or largely fill) that time completing the task. If they had only been given two days, they would in most cases be able to produce submissions making substantially the same points, even if not with the same level of flair or aplomb.”²³⁵

²³⁴ CIArb Survey 2011 p. 12

²³⁵ Morton (2010) p. 112

True as it may be that the issues of costs and delay are matters that parties and their representatives to the process exercise certain control over, the question still naturally arises as to the role which institutions and arbitrators have, and should play in this context.²³⁶

Thus, 2010 report of a national summit hosted by the College of Commercial Arbitrators concluded *"organizations providing arbitration services should play a major role in bridging the gap between user expectations and experiences regarding speed, efficiency and economy in arbitration."*²³⁷

The same year, Naimark, senior vice president of the AAA's International Centre for Dispute Resolution (ICDR), observed, there has been an increasing chorus of voices that international arbitration is getting too lengthy and expensive, mostly because institutions put less effort to control time and cost of international arbitral proceedings.²³⁸ Accordingly conducting ICA may amount to an unbearable burden for small and mid-size companies.²³⁹

The 2011 CIArb Cost Survey shows that on claims for £1m or less, irrespective of the nature of the dispute, in 52% of cases parties spent more than £250,000 (approximately \$405,000).²⁴⁰ Notably, in 21% of cases, the costs of arbitration were between £250k and £500k. And for 7% of cases, the cost of arbitration was actually more than the amount in dispute.

²³⁶ Panjabi, R. (1995) p.173 See also Lew (1999) p. 283-290

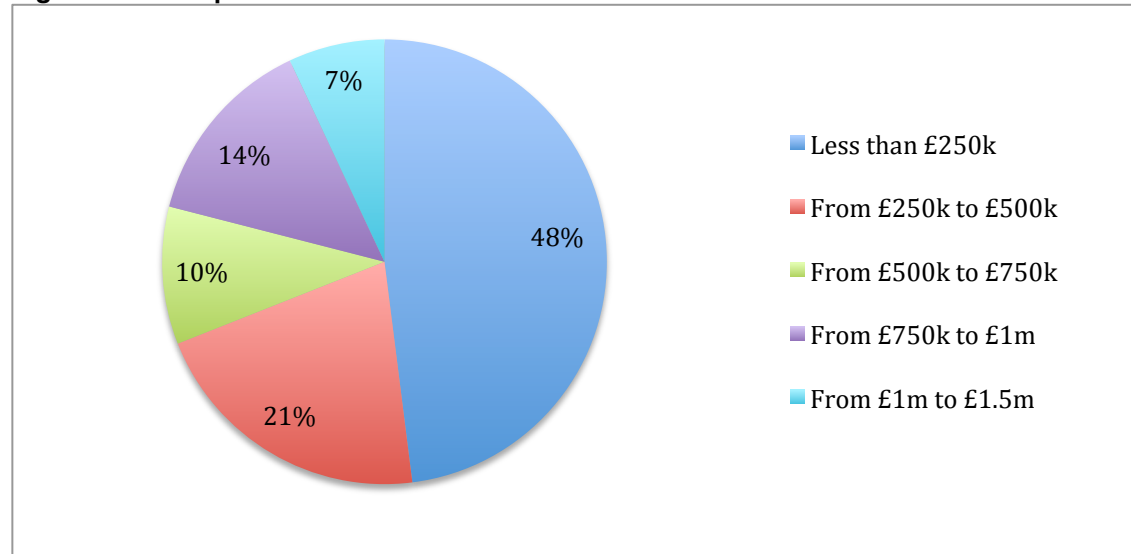
²³⁷ Stipanowich (2010)

²³⁸ Seidenberg (2010) p. 50-55

²³⁹ Drahozal (2007) p.813

²⁴⁰ CIArb Survey 2011 p.2

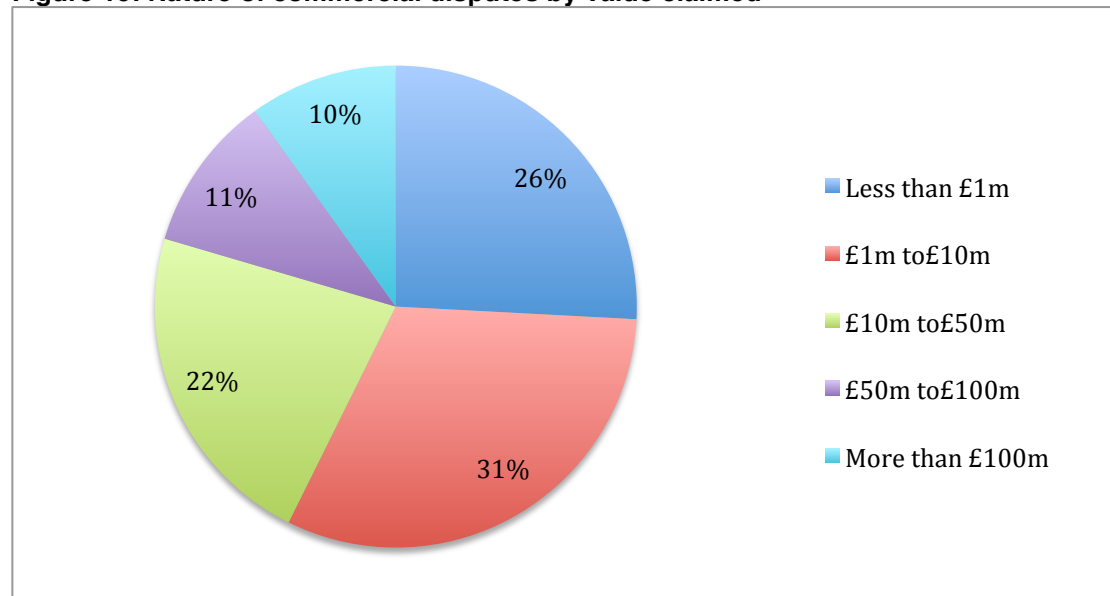
Figure 9: Cost spent in arbitration when less than £1 million value claimed



Source: CIArb Survey 2011 p.10 Chart 11 How much did they spend? p.27 Appendix

Given that 26% of commercial disputes were £1m or less in 2011 (Figure 10) these costs go a long way to explaining the dissatisfaction of arbitration users of small and mid-sized disputes.

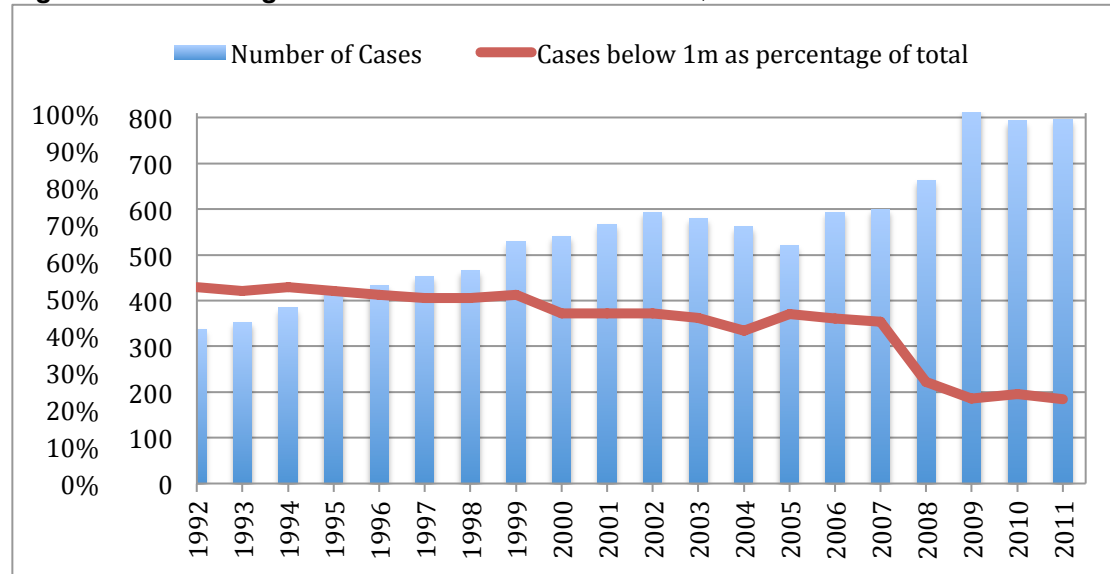
Figure 10: Nature of commercial disputes by value claimed



Source: CIArb Survey 2011 p.26 Appendix

ICA is particularly poor value for disputes under \$1m. Thus, from 1992 to 2011 the number of ICC cases more than doubled but the percentage of cases under \$1 million amounts has never fallen below 23%.

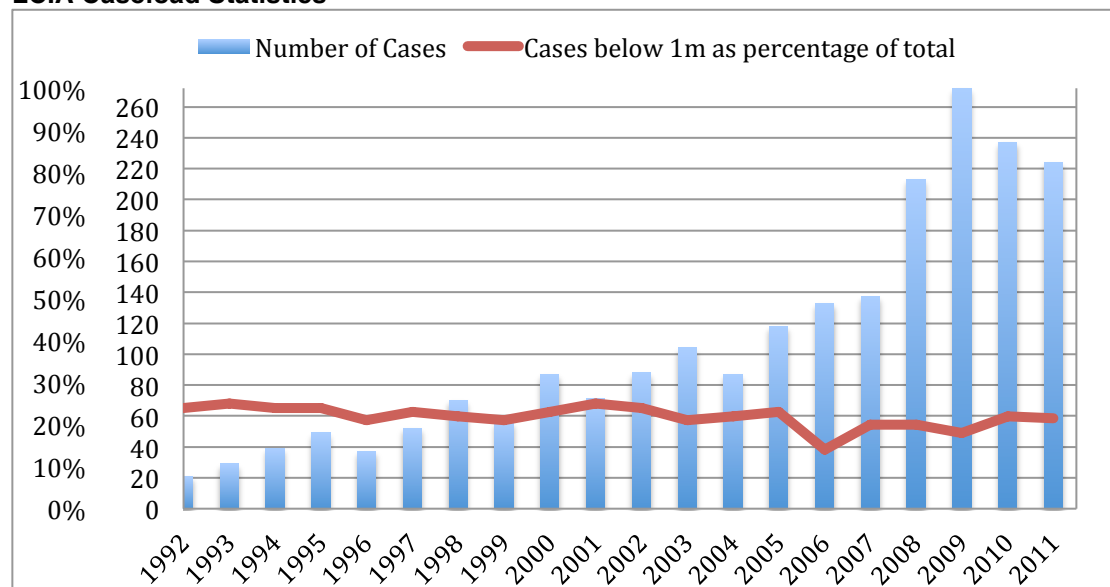
Figure 11: Percentage of ICC Arbitration cases below \$1m – 1992 to 2011



Source: ICC Caseload Statistics

The LCIA's caseload statistics show a similar trend with an average 21% of cases submitted between 1992 and 2011 being valued at £1m or less.

Figure 12: Percentage of LCIA Arbitration Cases below \$1m – 1992 to 2011 Source 1: LCIA Caseload Statistics



Source: LCIA Caseload Statistics

Figure 9 shows that when less than 1m was claimed, 21% of arbitrations cost close to or more than the value of the dispute.²⁴¹ This well illustrates the

²⁴¹ See supra p. 67 figure 9, 21% of respondents spent more than 750k

frustration of parties bringing small-sized disputes to ICA since 1992. Any company that spends half a million pounds on a claim of 1 million is going to be unhappy with the result. While it may be reasonable to pay such high arbitration costs for the resolution of larger cross-border disputes, for smaller and mid-size disputes the legal cost of applying to international commercial arbitration may be higher than the parties can bear and render arbitration an inaccessible forum.²⁴²

2.3 The reasons for excessive cost and delay in ICA

There are many reasons for excessive cost and delay in ICA. Some are caused by delaying tactics. Others seem inevitable due to the complex nature of international commercial disputes. In this section, the thesis will introduce a list of problems in relation to the reason for excessive cost and delay but the solutions will be provided in the later chapters. Thus, there are many reasons for escalating costs and delay in international commercial arbitration:

- Pre-dispute agreements can sometimes fail to provide robust conditions which are easy to challenge later.
- The controls for dilatory tactics are inadequate in ICA.
- ICA worse at handling parties from different cultural and legal backgrounds than international litigation and domestic arbitration. Parties often have differing expectations about how the dispute will proceed which can cause confusion and conflict;
- the increasing involvement of large American law firms has brought lengthy US-style litigation procedures to international commercial arbitration;
- the increasing use of local lawyers as counsel or arbitrators has created practitioners who are insufficiently familiar with international arbitration processes;

²⁴² Craig/Park/Paulsson (2000) p. 395

- international commercial disputes often and increasingly involve extremely large sums of money which directly affects the cost of administration but such high cost of administration is unreasonable for smaller and mid-sized ICA cases;
- international commercial disputes are frequently either very technical or legally complex in nature. These cases are bound to take longer and cost more. Trying to reduce cost and delay of these cases will increase complication rather than saving cost and time.

2.3.1 Providing for unknown circumstances

One of the key obstacles to achieving speed and economy in international commercial arbitration is making bad choices in the arbitration agreement that fail to anticipate the circumstances of a possible future arbitrations.²⁴³

Before the dispute has occurred the parties cannot know the subject matter of the case, the amount in dispute, or even whether there will be a dispute at all.²⁴⁴ This creates a challenge when it comes to drafting an arbitration clause in a business contract. The potential areas for dispute are almost limitless, and yet trying to cover every eventuality with a plethora of provisions can result in ambiguity which only leads to cost and delay. It might therefore appear that guaranteeing quick and economic dispute resolution in the absence of the specifics of the dispute is an impossible task. However, arbitration literature offers many suggestions for the creation of an appropriate arbitration clause.²⁴⁵

The real problem is that when contracts are being agreed and the emphasis is on building a new business relationship, parties often feel it is inappropriate to sour matters by arguing over a dispute resolution clause.²⁴⁶ Understandably,

²⁴³ Note on Expedited ICC Arbitration Procedure of 2002

²⁴⁴ Born (2010) pp. 37-116

²⁴⁵ Capper (2010)

²⁴⁶ Newman (2009) p.1326

the businessmen and lawyers who negotiate deals are far more concerned with reaching agreement on the salient commercial terms, such as amounts to be paid or invested than they are with dispute-resolution clauses. As a result, during contractual negotiations, the arbitration agreements are often drafted carelessly on a “boiler-plate” or “one size fits all” clauses with inadequate modifications to properly regulate all future disputes.²⁴⁷ Whereas, in fact, agreeing on a suitable clause when the commercial relationship is amicable is far easier than when the parties are in dispute and is almost certain to make arbitration easier, quicker and cheaper.²⁴⁸

2.3.2 Delaying Tactics

Although a party does not know before a dispute arises whether it will be the claimant or the respondent, once it is known the party’s attitude changes dramatically. Thus, after the dispute, the parties’ interests in a quick and economic resolution rapidly become polarised. The former business partners, who are now claimant and respondent, will want to achieve very different things. This turns arbitration more and more into a hostile forum to argue over the failings of their business relationship rather than to agree on effective measures to reduce delay and minimise cost.²⁴⁹ It is thus the parties themselves who mainly contribute to cost and delay due to their conflicts of interests and resulting non-cooperation during the proceedings.²⁵⁰

Claimants will want their award as soon as possible and will naturally give a high priority to achieving speed and economy.²⁵¹ By contrast, the majority of respondents will have no interest in quicker or more cost-effective proceedings.²⁵² Indeed, respondents may prolong the case for as long as

²⁴⁷ Capper (2010)

²⁴⁸ IBA Guidelines for Drafting International Arbitration Clauses. (2010, October 7) para.1 (“Poorly drafted arbitration clauses may be unenforceable and often cause unnecessary cost and delay.”)

²⁴⁹ Lazareff (1996) pp. 550-564.

²⁵⁰ Harris (1992) pp. 87-95

²⁵¹ Okekeifere (1998) 81-106.

²⁵² Barrington (2009) p.28

possible in an attempt to drive up its cost and force the claimant to abandon the case.²⁵³

The respondent will use various types of dilatory tactics before the establishment of the arbitral tribunal: claiming that neither the notice nor the claim was received; contesting the validity of the arbitration proceeding itself; claiming that the matter in dispute falls outside the scope of the agreement; contesting the existence of a dispute at all; petitioning interventionist national courts to interrupt arbitral proceedings; arguing that the claim is incomplete or needs amplification; refusing to contribute to the down payment for the costs of the arbitration; failing to appoint an arbitrator; employing an arbitrator who is too busy; challenging the other party's arbitrators; disputing the number of arbitrators; delaying the appointment of lawyers; appointing additional lawyers and demanding additional preparation time. All these dilatory tactics are worse in ICA than international litigation or domestic arbitration where particular national judicial system can exercise immense power to reduce the dilatory effects.

After the tribunal is formed the respondent can be uncooperative in many ways: challenging the jurisdiction; not adequately clarifying the matters in issue, making indiscriminate requests for document production; producing too many documents and failing to select a working core bundle; raising questions about language; slowing proceedings by failing to exploit modern developments in computer and information technology such as taking all evidence orally and recording it by hand.²⁵⁴

Arbitral tribunals now habitually accept elaborate written submissions which produce huge numbers of documents. They allow lengthy document production requests and admit countless bindings, witness lists and expert reports.²⁵⁵ This all favours delaying tactics.²⁵⁶

²⁵³ Okekeifere (1997) 125-139.

²⁵⁴ Josiah (2008)

²⁵⁵ Bedard (2009) p. 74

Disagreements about members of the arbitral tribunal can also delay the procedure. These most commonly centre on whether or not party-appointed arbitrators are impartial,²⁵⁷ and inevitably run up time and cost.²⁵⁸ In some cases a party has forced its arbitrator to resign to delay proceedings.²⁵⁹ Because these challenges to the impartiality of the chairperson or the party-appointed arbitrator are only designed to delay proceedings, they are often unfounded.²⁶⁰

Dilatory tactics can also be employed during the execution and enforcement of an award. One of the parties may call for the intervention of a court at several of the stages between the request of arbitration and the notification of the final award. Issues asserted before the courts include designation of the arbitrators, the scope of the arbitration, the arbitration agreement itself, the extension of a time limit to render the award, the measures enforcing provisional orders, assistance in taking evidence and appointing experts, the deposit and notification of an award, and the declarations of enforceability. Furthermore, courts will need to intervene if one party has to force the other party to comply with the award.

A supreme example of delay and cost in arbitration is *Black Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg AG*,²⁶¹ an arbitral proceeding which lasted for 15 years, within which time all the original members of the tribunal resigned and new ones were appointed. During the proceedings the parties were often in conflict over procedural conduct. Dilatory tactics, non-party cooperation and several recourses to the courts contributed immensely to the cost and duration of this case.

²⁵⁶ Lowenfeld (1997) p. 657 (describing procedural solutions to procedural problems in the international context)

²⁵⁷ Nelson (2011)

²⁵⁸ Lord Hacking (2006) p.26-30

²⁵⁹ Gelinas (1998) p.62

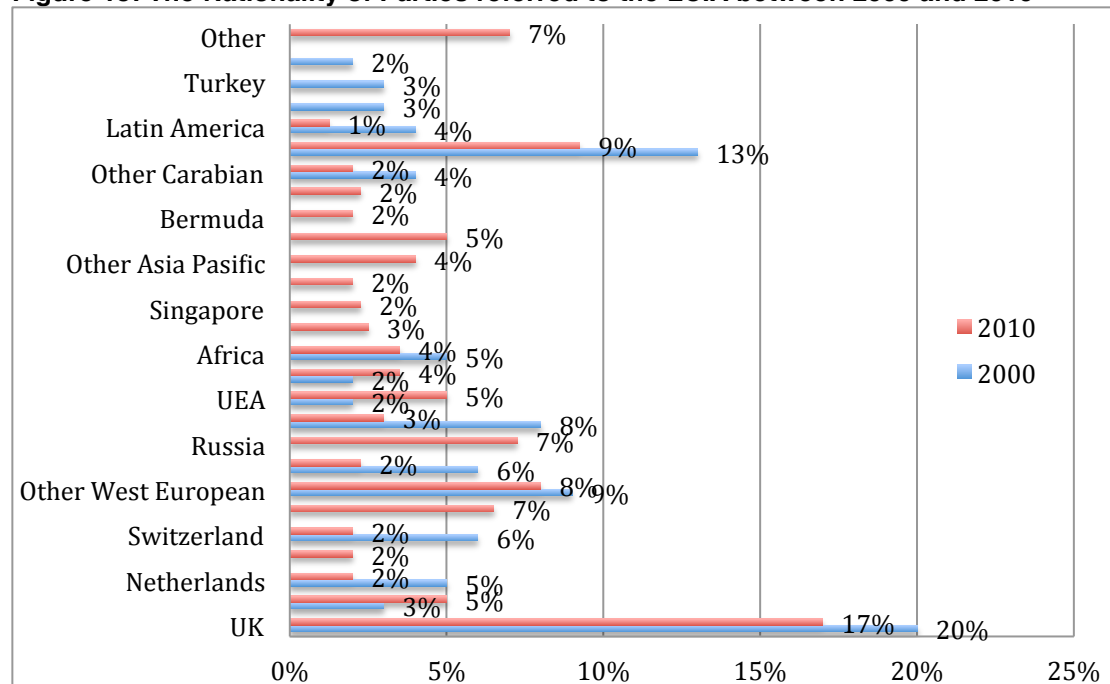
²⁶⁰ The LCIA Arbitrator Challenge Digests of 2011 in Arbitration International

²⁶¹ (1981) 2 Lloyd's Rep. 446

2.3.3 Differences in cultural and legal backgrounds

The most efficient international arbitrations usually occur in arbitration friendly countries, where quicker and cheaper arbitral proceedings are permitted under the applicable civil law and common law. However, in today's business environment, most users of international arbitration come from countries that are not arbitration friendly.²⁶² Thus expanding markets like Russia, China, Latin America and the Middle East present new challenges.²⁶³ In 2010 the ICC oversaw disputes involving 2,145 parties from 140 countries and independent territories.²⁶⁴ LCIA arbitrations in 2010 involved parties from Russia (7%), Asia Pacific (7%), Africa (4%) and the Middle East (9%). None of these countries were listed in 2000.²⁶⁵ This shows a great regional shift from parties of arbitration friendly nations to parties of less arbitration friendly nations like China, India, the Middle East and other Asia Pacific.

Figure 13: The Nationality of Parties referred to the LCIA between 2000 and 2010



Source: 2000 and 2010 LCIA Statistics

²⁶² Born/Kent (2006)

²⁶³ Trakman (2007) p. 37

²⁶⁴ 2010 ICC Statistics. Whereas, in 1999 those requests concerned 1,354 parties from 107 different countries. See 1999 ICC Statistics for comparison.

²⁶⁵ 2000 and 2010 LCIA Statistics See also Appendix 1

A party's cultural and legal background may influence what it expects to get out of arbitration.²⁶⁶ The areas where parties may differ most in their expectations are, according to Lew: the evidence gathering process; the examination and preparation of witnesses; “inquisitorial” tribunals; the provision of written pleadings over oral submissions; the use of expert evidence; *how* foreign law is proved and the determination of costs in arbitration.²⁶⁷

In *Continental Grain Co. v. China Petroleum Technology*²⁶⁸ Chinese parties initially enjoyed good progress with the arbitrator, Mr. Bruce Harris. Later, however, they applied for his removal on the ground that at the time of his appointment they believed, mistakenly, that he was a lawyer. The misapprehension stemmed from Mr Harris' curriculum vitae which indicated that he had been for a period of ten years “*with Richards Butler & Co. (now Richards Butler), major City of London solicitors*”²⁶⁹. From this, and Mr Harris' extensive experience as arbitrator, the Chinese parties assumed that Mr Harris was legally qualified.

The claim was not however supported by Mance J., who found that there was no ambiguity surrounding Mr Harris' appointment:

*“It simply arises from the interpretation which the respondents say that they put on that C.V., an interpretation which I, for my part, would say was not objectively justified, certainly in the London context in which the C.V. was submitted. This type of unilateral mistake can have no relevance in this case.”*²⁷⁰

²⁶⁶ Pair (2002) pp. 57-74

²⁶⁷ Lew/Shore (1999) pp. 33-38.

²⁶⁸ The decision concerned two related arbitrations: *Continental Grain Co. v. China Petroleum Technology & Development Co.* and *China National Petroleum Co.*, and *LG Caltex Gas Ltd v. Asia Pacific Petrochemicals Ltd*, *China National Petroleum Co. and China Petroleum Technology & Development Co.* (December 4, 1998, Comm. Ct., Mance J.)

²⁶⁹ *Ibid*

²⁷⁰ *Ibid*

The cultural and legal background of the arbitrator may also affect the conduct of the proceedings.²⁷¹ Although there are ethical rules for the conduct of international commercial arbitration, arbitrators from different backgrounds may conduct proceedings differently. For instance, although, document production is expected to be very limited in international arbitrations due to the significant cost and delay it adds to proceedings,²⁷² an American lawyer usually assumes that they will have the opportunity to discover all facts that are *"reasonably calculated to lead to the document production of admissible evidence."*²⁷³ This contradicts with the assumption of lawyers from Civil Law jurisdictions like France, Germany and Switzerland where the compulsory disclosure of documents is an exception and always requires the intervention of an arbitrator or a judge.²⁷⁴ Thus, an astute respondent may choose an arbitrator with a common law background like an American lawyer who is likely to grant widespread document production and hence increase delay and cost.²⁷⁵ The claimant may conversely seek to appoint an arbitrator from a civil law background who they believe will provide a quicker and more cost-effective dispute resolution.²⁷⁶

Although IBA Rules on the Taking of Evidence in International Arbitration appear to eliminate such cultural barriers and to harmonize the varying approaches from different legal backgrounds, they are nevertheless only a guidance rather than hard law. Mandatory rules and laws concerning arbitral procedures and evidence will still apply, such as only a man can be a witness in Islamic Sharia law and this may be conflicted with the modern international arbitration practice.²⁷⁷

²⁷¹ Tiessen (2005) p. 877

²⁷² *Glamis Gold, Ltd. v. United States of America* (UNCITRAL) NAFTA Arbitration Tribunal's award of 08 June 2009; See also *Stroh Container Co. v. Delphi Industries, Inc.*, 783 F.2d 743, 751 (8th Cir. 1986).

²⁷³ Fed.R. Civ. Proc. Section 26(b)(1)

²⁷⁴ Shore (2004) p.76.

²⁷⁵ Correa (2009)

²⁷⁶ Okekeifere (1998) pp. 129-44

²⁷⁷ *Sanghi Polyesters Ltd (India) v The International Investor (KCFC) Kuwait* 2000 1 Lloyd's Rep 480

Cultural and legal differences also play a role in whether early settlement of a dispute is easy or difficult.²⁷⁸ While voluntary settlement serves both parties by keeping costs down,²⁷⁹ like any contract negotiation, the process of negotiating a settlement may work differently in different cultures.²⁸⁰ For instance, certain legal cultures such as China and Japan like to "cut to the chase" by quickly identifying the key issues to be resolved and then negotiating those issues one by one. Other cultures such as USA and UK prefer to start with relatively unimportant issues and slowly work their way to the key issues.²⁸¹ Some cultures see no problem with an arbitrator being directly involved in facilitating a voluntary settlement others cultures may see direct involvement of arbitrators as contradictory to the principle of impartiality of decision makers.²⁸² Some nations allow parties to begin negotiations all over again just when it looked like all the issues had been resolved others see this dilatory attempt to extend the issuance of arbitral awards.

One of the results of globalization is the increasing fluency of the English language throughout the world. Since managing arbitration is easier when all parties can communicate in the same language, English is often chosen as a language of arbitration.²⁸³ However, this can cause arbitrators and opposing parties to believe that everyone has the same expectations of the arbitration when actually cultural and legal differences exist.²⁸⁴ Arbitrators and parties may be speaking the same language but the parties may not fully understand the meaning of what is being said.²⁸⁵ Such misunderstandings may go unnoticed by arbitrators who do not appreciate the relevance that coming from

²⁷⁸ Bühring-Uhle/Kirchhoff/Scherer (2006) p. 144

²⁷⁹ *Ibid* p. 156

²⁸⁰ Kaufmann-Kohler (2007)

²⁸¹ Antaki (2006) pp. 265-303

²⁸² DIS Arbitration Rules of 1998 Section 32.1; CAM Arbitration Rules of 2010 Article 22.1; Draetta (2010) pp. 361-74; Kaufmann-Kohler (2007); Raeschke-Kessler (2005) pp. 523-36.

²⁸³ SIAWC Survey (2010) pp. 3, 19 and 20

²⁸⁴ IBA Rules of Ethics for International Arbitrators of 1987 Article 2(2) requiring arbitrators to have the knowledge of the language of the arbitration.)

²⁸⁵ *Ibid*

different cultures has in reaching decisions.²⁸⁶ Hence, this is a common practical issue in ICA.²⁸⁷

2.3.4 Americanization of International Commercial Arbitration

The huge increase in the value, number and size of international disputes has created an urgent need for more experienced arbitration practitioners. In response, many global law firms have come into ICA and become quite sophisticated in the arbitration game, whether under civil or common law.²⁸⁸ Almost all of them established international dispute resolution division which resulted in hundreds of new arbitration specialists from different countries.

American lawyers bring with them US-style procedural techniques, court standards of minimum contacts between the arbitrators and the parties (and their counsel).²⁸⁹ Thus, many American attorneys commented on Dezelay's research in *Dealing in Virtue* that international arbitration is but one "*kind of litigation*,"²⁹⁰ simply in a "*different forum*,"²⁹¹ and behave during arbitration hearings "*as if a jury was there*."²⁹² Thus, with the arrival of more American lawyers, arbitration is turned into a sort of "*off-shore litigation*"²⁹³ at the expense of its traditional virtues: speed and economy.

For example, in most foreign and international tribunals, US-style cross-examination techniques and aggressive litigation tactics are considered unprofessional and at worst unethical.²⁹⁴ Nevertheless, excessive document production requests, non-stop depositions, challenge of arbitrators' impartiality, simultaneous litigation proceedings in several forums, and tactical

²⁸⁶ Cremades (1998) p. 158

²⁸⁷ *Laker Airways Inc v. FLS Aerospace Ltd & Another* 2000 1 WLR 113 (20/4/99) (Mr Justice Rix, now Lord Justice Rix).

²⁸⁸ Dezelay/Garth (1996) p. 42

²⁸⁹ Helmer (2003) p.42

²⁹⁰ Dezelay/Garth (1996) p. 55

²⁹¹ *Ibid* at 55

²⁹² Rau/Sherman (1995) p.95

²⁹³ Dezelay/Garth (1996) p. 53

²⁹⁴ Rogers (2008) p.1038

manoeuvres have become commonplace. The use of these techniques in ICA is a source of concern for global arbitrators and practitioners.²⁹⁵ As Lalive²⁹⁶ observed in 1995 that, *“international arbitration is exposed to lose its well-known, or alleged, flexibility and its traditional peaceful and conciliatory character due to the role and methods of American litigators in international arbitrations.”*²⁹⁷

In 2010 Seidenberg made a similar observation that the involvement of US lawyers as counsel for the parties and as arbitrators leads to more document production and more contentiousness, resulting in arbitration proceedings that begin to resemble American-style litigation, with many of the ‘abuses’ (like extensive document production, declining civility, and excessive gamesmanship) that outrage the international business and arbitration community.²⁹⁸

2.3.5 Specialists arbitration lawyers could not reduce excessive cost and delay in ICA

ICA has become a specialized field in its own right. Lawyers who once would have been involved arbitration once in a blue moon now work only within ICA.²⁹⁹ Arbitrators, in-house counsel and arbitration lawyers have become the main component of arbitration and litigation is only relevant in order to enforce arbitration clauses or awards.³⁰⁰

²⁹⁵ Lalive (1995) p. 52

²⁹⁶ *Ibid* at 54

²⁹⁷ *Ibid* at 54

²⁹⁸ Seidenberg (2010) p. 50-55

²⁹⁹ Arbitration Roundtable of Toronto (2008) An Arbitration Primer for Corporate Counsel and Business Lawyers

³⁰⁰ There is now also a growth industry of highly developed techniques of additional or alternative dispute resolution (ADR) as adjuncts or precursors to arbitration, but this thesis is only concerned with arbitration.

These arbitration specialists are, in effect, a new breed of international arbitration lawyers. But their outlook and working methods are different from domestic arbitration lawyers who operate within a fixed arbitration rules and laws of a particular country. The new breed is required to be more creative, beginning with the negotiation of dispute resolution clauses designed to give the greatest effect to their clients' interests. This requires that they take account of the arbitration laws and practices of countries considered as potential arbitral venues, or as places of contractual performance, or as possible jurisdictions for the enforcement of awards. They must also be familiar with the rules of the various international, regional and national arbitral institutions which now exist in many parts of the globe. Then, when a dispute has arisen, creativity is required in order to be conciliatory rather than adversarial.

Over time, being an ICA specialist has taken over the territory historically reserved for being a litigation specialist in a particular country. In order to grapple more effectively with complex business disputes, arbitration procedures have become longer and more detailed, and lawyers turned new arbitration specialists are using the same approach as their counterparts in litigation. Trial practice, with its heavy emphasis on prehearing motions and intensive document production, is reinforced by ethical rules enshrining a model of zealous advocacy.³⁰¹ For lawyers accustomed to full-fledged document production, anything less may seem tantamount to inviting claims of malpractice. As one American arbitrator observes:

*"Most lawyers are reluctant to go ahead and try the case. Many times I have tried to shorten the time [frame] and have the hearing sooner, ... [but] in many instances the lawyers want more time to get prepared."*³⁰²

³⁰¹ Stipanowich (2009) p.12

³⁰² John Hinchey, Remarks at the Annual Meeting of the American College of Construction Lawyers: Adjudication: Coming to America (Feb. 22, 2008) See also Hinchey/Harris (2009)

While arbitration rules give parties freedom to set shortened time limits this does not always result in the elimination of superfluous proceedings. Once a defined course of procedure is begun a zealous arbitration lawyer, eager to protect the interests of his client, will stick doggedly to every one of the procedural steps. The first examples of superfluous arbitral proceedings arrived in the early 1980s with a number of high-profile international arbitrations involving huge costs and delays. International investment, large commercial works and construction disputes were prominent as in the cases of *SEEE v. Yugoslavia*³⁰³, *Dame Krebs*³⁰⁴ and *MINE*.³⁰⁵

In *Enel (National Electricity Board) v. Saci*³⁰⁶ the dispute was referred to arbitration on 17 July 1979 and judgment was entered on the award on 18 May 1982 (i.e. three years later). The award was attacked before the Court of Appeal, Rome and on 14 January 1985, the Court rejected the challenge. The appellate judgment was further attacked before the Court of Cassation which rejected it on 16 March 1989. In conclusion there were ten years of legal battle from the beginning to the end. The amount awarded was only US\$50,000.³⁰⁷

These cases gave ICA a bad name and brought about the belief that only by providing special forms of expedited procedure would dispatch be achieved without undue cost and delay.

³⁰³ *Société Européenne d'Etudes et d'Entreprises (SEEE) by its liquidator Mme Y. Cleja (France) v. Socialist Federal Republic of Yugoslavia, International Bank for Reconstruction and Development (the World Bank) and others*, Cour d'appel Court of Appeal (1st and 2nd Civil Chambers) of Rouen, Not Indicated, 13 November 1984 in Albert Jan van den Berg (ed), (1986) XI YBCA 491, 499

³⁰⁴ *Dame Krebs et autre v. Milton Stem et autre*, Court of Cassation (France), June 16, (1976), Clunet 1977, 671

³⁰⁵ *MINE v. Republic of Guinea, Court of Geneva, Switzerland*, 13 March 1986, YCBA, 1987, Vol. XII, p. 514.

³⁰⁶ *Enel v. Saci, Court of Cassation, Rome, Italy*, 16 March, no. 1288, 1989, Foro Pad 1990, no. 2.

³⁰⁷ Rubino-Sammartano (1990) p.25

2.3.6 Representation by Inexperienced Lawyers

The increased size and complexity of international commercial disputes has placed a premium on specialist expertise.³⁰⁸ As a result, an increasing number of lawyers are putting themselves forward as international arbitration specialists.

Lawyers, because of their legal knowledge and skill in presenting their clients' cases, can potentially play a valuable role in arbitration proceedings.³⁰⁹ Their expertise should ensure that the issues in dispute are properly defined and that the evidence and legal arguments are efficiently and clearly presented to the arbitrator. But often these benefits are not reaped in ICA practice, because many lawyers representing the parties are insufficiently familiar with the dispute resolution practices of the industry they are representing in the international context.³¹⁰ This lack of experience can have a significant impact on increasing cost and delay.

A 1983 editorial in the Engineering News Record (ENR) offered a perspective from the international construction industry:

“As most people know, the beauty of arbitration is that arbitrators are experts in industry matters and can use informal hearings to cut right to the heart of a dispute without the years of delay and resultant expense likely to be encountered in the judicial system. But, say those ENR talked to, attorneys without construction experience are increasingly finding their way onto panels, where they often turn hearings into pseudo-court proceedings complete with delays caused by anachronistic judicial rules of evidence, document production, and methods of proof. This development, coupled with parties’

³⁰⁸ Born/Kent (2006)

³⁰⁹ Jones (1987) p. 230-231.

³¹⁰ Nariman (2005) pp. 549-56

*increasing use of attorneys to represent them in such hearings, is starting to slow the system down.*³¹¹

Multiple problems can compound to make things even slower. External lawyers may want to adopt regular arbitral proceedings rather than unfamiliar time and cost saving techniques.³¹² Counsel from different backgrounds may adopt different procedures causing delays while conflicting approaches are reconciled.³¹³ And inexperienced counsel may require more guidance from the arbitral tribunal to help move the proceedings forward. Any or all of these will lead to proceedings that are longer and more expensive than they need to be.

2.3.7 E-document production

Storing information electronically and using new information technologies, like video conferencing and interactive briefings, opens new horizons for efficient management of disputes but these developments also create new challenges and risks.³¹⁴ As one practitioner observes:

*“If the law of e-document production were allowed to develop on an ad hoc basis [in ICA], one decision at a time, companies with their complex information technology systems would be eaten alive by process costs. It is essential to develop best practices that work in a real world”*³¹⁵

A major problem with electronic documents is the ease with which they may be modified and the difficulty in detecting such changes.³¹⁶ This means it can be very difficult to identify exactly which version of a document was communicated between the parties and, of course, this may be crucial in

³¹¹ Engineering News Record, Feb. 24, 1983, p. 59 quoted in House/Corgan (1991) p. 37

³¹² Beerbower (2011) pp. 75-90

³¹³ Seidenberg (2010) p.50

³¹⁴ Hill (2008) p. 89-106

³¹⁵ Sedona Conference (2005)

³¹⁶ Fletcher (2006) p. 101

determining a factual or legal situation.³¹⁷ Consequently, consultation with technical experts may be required by the parties and arbitrator to assess the authenticity of documents and this will obviously bring additional time and cost to the arbitral proceedings.

Other problems with e-document production include the essential scope of and limits on document production, the weighing of burdens and benefits,³¹⁸ the handling of the costs of retrieval and review for privilege,³¹⁹ the duty to preserve electronic information.³²⁰

2.4 Slowness and expense may be acceptable to parties in some type of international commercial disputes

International commercial disputes involve multi-judicial proceedings in different national judicial systems, each with its own laws and procedural standards.³²¹ Because it is difficult to stay court proceedings in one jurisdiction on the basis of litigation proceeding in another country, cross-border litigants may find themselves simultaneously pursuing multiple avenues of relief, or defending multiple proceedings in the home country, the opponent's home state, and in the place where assets are located.³²² Each of these avenues brings with it a potentially unknown system of law and procedure, and the potential of corruption, bias, or influence.³²³

Even when such complicated and protracted international disputes are decided, a court victory can be essentially worthless if the loser's assets are located outside the jurisdiction covered by the resulting court order, since international recognition of court judgments is quite rare and hedged in with

³¹⁷ Schneider/Howell (2008)

³¹⁸ *Ibid*

³¹⁹ Repa (2004) p. 257

³²⁰ Theodore (2007)

³²¹ Knull/Rubins (2000) p.541

³²² Dezelay/Garth (1996) p. 8

³²³ *Ibid*

conditions and limitations.³²⁴ The NYC overcomes some of the difficulties of enforcing awards in international commercial disputes, but there can still be problems in countries which, despite being signatories to the NYC, are less arbitration friendly.³²⁵ Because of these uncertainties, parties and arbitrators in arbitral proceedings feel obliged to do all they can to increase the likelihood of an award being enforced. Consequently, arbitral proceedings can become subject to those same stringent duties of disclosure and document production requests which are normally expected to arise in litigation under common law. Such procedures can involve substantial costs and delays, particularly while the mechanisms for dealing with international commercial disputes remain to be fully developed.

According to the ICC, 77% of the cases initiated under its rules in 2011 were worth more than US \$1 million.³²⁶ International contracts for infrastructure, energy and manufacturing attract financing of tens, hundreds, or even thousands of millions of dollars.³²⁷ Since ICA increasingly involve disputes over extremely large sums of money, many parties do not want to risk enforceability in order to save time and cost.³²⁸ The ICC's statistics clearly show that parties raise fewer complaints about high costs and long delays when the dispute is complex and high value.³²⁹

ICA also frequently involves technical and legally complex disputes.³³⁰ Large-scale construction or energy-related projects are often carried out in less-

³²⁴ Cromie/Park (1990) p. 459

³²⁵ Moss (2003), pp. 1-17

³²⁶ Similarly, medium and large arbitrations initiated with more than \$1 million at issue have reached 60% of the LCIA arbitrations, 65% of the AAA arbitrations and 55% of the SCC arbitrations in 2011.

³²⁷ Fullbright's 8th Annual Litigation Trends Report (2011) p.14 (Almost a quarter of all companies surveyed have faced at least one lawsuit with more than \$20 million at issue. Overall, U.K. companies facing one or more arbitrations with \$20 million or more at issue were 12% in 2011, up slightly from 9% in both 2009 and 2010. Where USA companies facing less upwards trends with 8% in 2011, up slightly from 7% in 2010 and gradually from 4% in 2009.

³²⁸ Lew (1997) p.473

³²⁹ Arnaldez/Derains/Hascher (2009); Arnaldez/Derains/Jarvin (1994); Derains/Jarvin (1990) See i.e. *Pabalk Ticaret Limited Sirketi v. Norsolor SA*, Court of Appeal, Vienna, Austria, 9 January 1982, VII YCBA 365 (1983); *Westland Helicopters Ltd v. Arab Organization for Industrialization et al.*, partial award 25 March 1984, XI YCBA 127 (1986)

³³⁰ Douglas (2003), pp. 151-289

developed countries but involve the funds and expertise of fully industrialized states.³³¹ The increase in the complexity of such transactions requires specialist expertise and elaborate proceedings to resolve disputes.³³² Thus, ICSID cases involving large amounting disputes are often reported to cost more and take longer than small amounting disputes.³³³

But for many larger organizations what it costs or how long it takes to resolve a particular dispute is unimportant. What counts, is the guarantee of procedural fairness, enforceability and confidentiality.³³⁴

2.5 What makes ICA slow and expensive?

The research of numerous practitioners and scholars cite costs and delay as a common problem.³³⁵ Clearly, parties, their in-house counsel and the external lawyers who represent them all have a responsibility for reducing excessive cost and delay.³³⁶ All participants are expected to refrain from any act that excessively increase costs and delay of arbitration.³³⁷ However, these expectations cannot reduce dilatory tactics. As Profaizer, international arbitration and litigation counsel, commented: *"if arbitration is to commit suicide, it will do so of its own choosing, because the parties have chosen to make it more expensive, time-consuming and more like litigation."*³³⁸

The arbitral tribunal is also required to avoid poor management of the arbitral proceedings.³³⁹ For example, adequate identification and delimitation of the

³³¹ Caron/Pellonpää/Caplan (2006)

³³² Born/Kent (2006)

³³³ Sinclair/Fisher/Macrory (2009) See also *Liberian Timber Corporation (Letco) v. Government of the Republic of Liberia*, award 31 March 1986, Clunet, 1988, p. 16.

³³⁴ Karrer (1986) p.35

³³⁵ Rivkin (2008) pp. 376-77; Hobeck/Mahnken/Koebke (2008) p. 85; Smit/Robinson (2010) pp. 267-283; A study conducted by the AAA comes to a different conclusion, see American Arbitration Association, the AAA, 2003, *Dispute-wise management: Improving economic and non-economic outcomes in managing business conflicts* at p. 9 ("The primary reasons for using mediation or arbitration include saving money and saving time")

³³⁶ See for instance SCAI Rules, Article 15(7)

³³⁷ Rivkin (2011)

³³⁸ Seidenberg (2010) p. 54

³³⁹ Mustill (1993) p.121

issues in dispute can have a considerable impact on the costs and length of the arbitration. It is their duty to render an award in due time without excessive delay. As one author put it: *"the secret of speed in arbitration is timely planning and due monitoring of the timing."*³⁴⁰ Once the arbitrator has accepted to act in an expedited procedure, he is bound and cannot step down for lack of time.³⁴¹ In some countries like Brazil and Argentina, where parties have determined a time limit for the award to be made, the courts will hold the arbitrator personally liable towards the parties if he does not respect the time limits.³⁴²

While it is the task of arbitrators to prevent non-cooperation and dilatory tactics by parties,³⁴³ many arbitrators believe their primary role is to render an enforceable award.³⁴⁴ In most instances, seeking to decide disputes fairly between the parties and maintain due process, arbitrators allow their arbitration to lag behind the speed achieved in the courts or in domestic arbitrations.³⁴⁵

Many corporate counsels claim arbitrators lack management skills.³⁴⁶ In particular, they are dissatisfied that arbitrators often fail to assert their authority and do not adequately limit or control the litigious instincts of the parties' lawyers.³⁴⁷ A number of prominent corporate general counsels cited the failure of arbitrators to control the process as the primary reason for lengthy hearings, elaborate document production and tardiness in coming to a decision.³⁴⁸

³⁴⁰ Rubino-Sammartano (1998) p. 149.

³⁴¹ Berger (2002) p.5; Bucher (2002) p.413

³⁴² Cour de cassation (Civ. 1ere), 6 December 2005, 2006 Rev Arb 126. See also Note of Charles Jarrosson, Cour de cassation (Civ. 1ere), 6 December 2005, 2006 Rev Arb 127-138

³⁴³ Rutherford (1995) p.6-12

³⁴⁴ Böckstiegel (1999) p.49

³⁴⁵ Park (2009) p. 697

³⁴⁶ McIlwrath/Schroeder (2008)

³⁴⁷ Bleemer (2006) pp. 182-185

³⁴⁸ Herbert Smith's ADR Survey (2007), (reviewed how twenty one leading multinational organisations use ADR in 2007); SIA/WC Survey (2010)

A number of arbitrators refuted these accusations, stating that the problem lies in parties' failure to rein in their corporate counsel, and the obfuscation and delaying tactics of outside lawyers.³⁴⁹

The Law firm attorneys, on the other hand, blamed not only their clients, for wanting them to prolong the process and attack the opponent's case at all cost after the dispute, but also the arbitrators, for failing to make the tough decisions that would control the other side.³⁵⁰

So each group blames the other for long delays and excessive costs.³⁵¹ That such finger-pointing can be found in the notes of a 2009 roundtable discussion in London involving a number of well-known in-house lawyers for multinational companies, international arbitration counsel and arbitrators.³⁵² While all the stakeholders identified the lack of combined efforts as the main reason for cost and delay, each believed that another constituency was better placed to implement solutions to the problems.³⁵³

In the past 20 years a number of conferences³⁵⁴ and ICCA congresses have looked closely at the causes of cost and delay and ways of avoiding this.³⁵⁵ The most important observation is that these issues cannot be adequately addressed unless and until the international arbitration community establishes ways to achieve the concerted effort of each participant.³⁵⁶ The lack of joint action to overcome difficulties should not be the norm because it negatively

³⁴⁹ (Interview) Hunter, M. (2010), ("And one of the challenges there is that the expectations and wishes of the ultimate parties are not always the same as those of the attorneys, who are very often more interested in playing litigation games and making money")

³⁵⁰ Najar (2008) see also Lord Hacking (2006) p.26

³⁵¹ GAR Roundtable I: The Time and Cost Conundrum (2009, May 13); GAR Roundtable II : The Time and Cost Conundrum (2009, July 15)

³⁵² GAR Roundtable I: The Time and Cost Conundrum (2009, May 13)

³⁵³ *Ibid*

³⁵⁴ Gurry (1997); Horvath (2010); VIAC-INCITRAL 2010 Conference. (2010); Samaras (2011); 28th AAA/ICC/ICSID Joint Colloquium (2011, November 18); and more recently, 27th Annual Colloquium of Arbitrators (2012, March 26)

³⁵⁵ ICCA Congress Series Nos. 5, 7 and 9.

³⁵⁶ McIlwrath/Schroeder (2008) pp.13-11 (Frustration with the length and expense of the arbitral process is increasingly cited as the rationale for favouring court resolution or at least no longer favouring arbitration)

affects both the users and the providers of international commercial arbitration. Arbitration users suffer financial loss and valuable business time;³⁵⁷ arbitration providers risk seeing users take their business elsewhere.³⁵⁸

2.6 Concluding Remarks

ICA is faced with three problematic areas in relation to cost and delay. The first concerns the goals of arbitral proceedings and whether ICA should be faster than adjudication in the court system or domestic arbitration. Slowness and expense may also be reasonable in small and mid-size disputes rather than risking the enforceability of arbitral awards. However, this does not mean that slow and expensive arbitrations are acceptable in every case.³⁵⁹

The second problem area is procedural. There are many examples when parties want ICA to be fast and economic but poor procedural choices by contract drafters and their legal representatives result in excessive cost and delay. Some examples are: submission clauses which are found to be invalid or of insufficient scope to cover the dispute; the unavailability of prescribed or familiar methods of obtaining evidence; the lateness of order, timing, and manner of pleading; the lengthy presentation of both lay and expert witness testimony; inappropriate methods of proving a case, including unnecessary documents, depositions, briefs, and testimony; problems caused by the location and language of the arbitration proceedings; difficulty in agreeing the applicable law; and the inability to prevent delaying tactics.

The third area of concern for the slowness and expense in ICA is substantive. This includes: the choice of incompetent arbitrators - a decision crucial to the whole proceeding and potentially determinative of applicable substantive and

³⁵⁷ Whiteman (2006)

³⁵⁸ Drazhozal/Wittrock (2009) p. 71. See also Eisenberg/Miller (2007) p.75

³⁵⁹ Ulmer (2010) p.233; Rivkin (2008) pp. 375-386

procedural law; whether the form of an award should be reasoned, unreasoned or partly reasoned in the applicable arbitration law; and the vulnerability of an award to review and attack by national courts that will easily refuse enforcement.³⁶⁰ Too often an arbitration proceeding results in an unsatisfactory award and the litigation that the parties originally wished to avoid is commenced.

The chronicles of arbitration are full of arbitral proceedings in which long delays and expense have occurred and commercial parties are increasingly expressing their disappointment about the lack of requisite speed and economy in ICA.³⁶¹ The need to resolve a multitude of intermediate disagreements before considering the primary dispute often sacrifices one of the main benefits of arbitration—its speed and economy.

According to Stipanowich, arbitration has become the *"new litigation."*³⁶² Its benefits, in Phillips' report, have been undermined by *"judicialization"*, *"creeping legalism"* and *"incremental formalism."*³⁶³

McIlwrath and Schroeder, from a corporate counsel view, reported that *"frustration with the length and expense in the arbitration process is increasing as the rationale for favouring court resolution, or at least for no longer favouring arbitration"*³⁶⁴ As a consequence of this dissatisfaction there are reports of businesses removing arbitration clauses from their contracts and even company-wide bans on arbitration clauses.³⁶⁵

Corporate counsel, as shown by the 2010 SIA/WC Survey, expect arbitrators to be more pro-active in controlling time and cost and for more arbitration

³⁶⁰ Japaridze (2008) p. 1423

³⁶¹ See supra pp. 81 footnotes. 303-305

³⁶² Stipanowich (2009) pp. 1-48

³⁶³ Phillips (2003) p. 37

³⁶⁴ McIlwrath/Schroeder (2008) p. 6

³⁶⁵ Drazhozal/Wittrock (2009) p.73 "anecdotal evidence suggests that business communities are either abandoning arbitration altogether or using more 'carve-out' provisions (exempting specific categories of disputes from the arbitration clause)."

institutions to offer speed and economy rather than over zealous use of procedural formalities to increase fairness of the proceedings.³⁶⁶ As one corporate counsel observed:

“When businesses pay for private adjudication, they rightly expect speed and efficiency from the process, just as they expect these qualities from other service providers ... Realistically, however, it is difficult to comfortably predict an arbitration of any commercial complexity ending in fewer than two or three years ... a time frame ... which is simply too long, particularly for a private process ... in which any right to appeal is largely given up ... While business leaders also expect a fair resolution, taking excessive time can often be just as damaging as a wrong decision”³⁶⁷

In 2007, Herbert Smith’s survey of global corporate counsel showed a movement away from arbitration³⁶⁸ in favour of Alternative Dispute Resolution (ADR)³⁶⁹ mechanisms such as mediation,³⁷⁰ expert determination and early neutral evaluation and adjudication.³⁷¹ Staying away from ICA is very much in line with a survey conducted by the School of International Arbitration at Queen Mary, University of London, which showed that while in 2006 only 11 per cent of in-house counsel preferred litigation to settle international disputes, by 2008 the figure had risen to 41 per cent.³⁷²

After reviewing the attitudes of 21 of the largest global companies towards ADR, Herbert Smith’s Survey in 2007 observed:

³⁶⁶ Bühring-Uhle (1996) pp. 136-143 (one of the “two most significant advantages and presumably the two most important reasons for choosing arbitration as a means of international commercial dispute resolution is ... the superiority of its legal framework with treaties like the New York Convention guaranteeing the international enforcement of awards”); Naimark/Keer (2005) p. 95

³⁶⁷ McIlwrath/Schroeder (2008) p.6

³⁶⁸ Herbert Smith’s ADR Survey (2007) p. 37

³⁶⁹ Stipanowich (2004) p.843

³⁷⁰ Cronin-Harris (1994) See also Brennan (1999) (describing results of surveys of litigators and general counsel strongly supporting use of mediation)

³⁷¹ Herbert Smith’s ADR Survey (2007) p.36

³⁷² SIA/ PWC Survey 2006 p. 2 (“Expense and the length of time to resolve disputes are the two most commonly cited disadvantages of international arbitration”), 6, 7, 19, 20; SIA/PWC Survey 2008 p.2 (“the length of time and the costs of International Arbitration are seen as the disadvantages”)

*“One theme which arose repeatedly was a growing frustration with international arbitration as a dispute resolution process. Whilst it was recognised as a valuable process where the domestic courts of a particular jurisdiction were not considered to be an acceptable forum, the trend for arbitration proceedings to become more like litigation, slower, more expensive and lacking in robust procedural controls were all highlighted as pointing towards an uptake in mediation.”*³⁷³

As an alternative to arbitration, ADR may be cheaper and quicker but it does not offer final and binding solutions.³⁷⁴ ADR depends on a consensual resolution rather than confrontation.³⁷⁵ Therefore, it cannot be a replacement for arbitration.

Yet with speed and economy, the traditional benefits of arbitration, having been eroded over the last 25 years, clients are increasingly disenchanted with the system.³⁷⁶ In many instances the ultimate cost and time involved in resolving a dispute through arbitration are disproportionate to its value. The desire shown by international business communities for improved speed and economy forces the following question: Can the excessive costs and delay of international arbitration be avoided?³⁷⁷

³⁷³ Herbert Smith's ADR Survey (2007) p. 37

³⁷⁴ The 2007 Fulbright & Jaworski Litigation Trends survey found that only 9 per cent of respondents believed that international arbitration was cheaper than litigation (down from 26 per cent in 2006 and 32 per cent in 2005). The survey concluded that “the overall trend among the survey respondents seems to be that international arbitration is not seen as offering significant cost benefits over litigation”. The survey also found that the percentage of respondents who believed that arbitration was quicker than litigation fell dramatically, from 43 per cent in 2006 to 11 per cent in 2007.

³⁷⁵ ICCA Congress Series No 5 (1990)

³⁷⁶ Jones (2008) p.93

³⁷⁷ Rutherford (1995) pp. 6-12 Redfern (2008) p.1 McIlwrath/Schroeder (2008) pp. 3-11

3 AVOIDING COST AND DELAY

Numerous attempts have been made by both arbitration users and providers to reduce the excessive cost and delay of ICA. This chapter considers methods for expediting ‘regular’ or ‘ordinary’ arbitration.³⁷⁸ The following chapter will address FTA specifically and the differences between expedited regular arbitration and FTA will be discussed.

3.1 Party Autonomy enables speed and economy

Arbitration is a consensual process. Rather than impose on the parties how their dispute should be resolved, the principle of party autonomy allows parties to choose how they govern their arbitration.³⁷⁹

As Lew puts it:

*“Party autonomy is the primary source of the arbitration and the procedure. The arbitration will be governed by what the parties have agreed in the arbitration agreement subject to the limits provided by mandatory rules. The agreement may either directly design the rules and procedures to follow or do so indirectly by selecting the applicable arbitration rules.”*³⁸⁰

Accordingly, parties enjoy complete freedom to choose provisions for time and cost saving.³⁸¹ They can specify a sole arbitrator rather than three to save cost, and specify an expedited selection and appointment process of the arbitral tribunal to ensure speed.³⁸² They can select those procedural rules which are conducive to the business in question. For instance, speed and economy of maritime and commodity arbitrations in England are supported by

³⁷⁸ In this thesis the terms regular, ordinary or normal arbitration deliberately refer to non-expedited arbitration as apposed to fast-track.

³⁷⁹ Lau/Horlach (2010) p.121

³⁸⁰ Lew/Mistelis/Kröll (2003) pp. 28 ¶12-44.

³⁸¹ Kaufmann-Kohler/Stucki (2004) p. 59

³⁸² Fulmer/Rodriguez/Berry (2009) pp.149-170

many courts decisions in England. Fast-track notions of sports arbitration in Switzerland have proved to be upheld by law and thus enable arbitrators to freely provide immense time and costs saving.³⁸³

Parties can save money and time by choosing to have the seat of arbitration in the country most convenient for the parties, witnesses, experts and arbitrators.³⁸⁴

The parties can also ensure that the desire for timely and economic conduct of the arbitration is reflected in the arbitration clause.³⁸⁵ They can do this by choosing specific sets of institutional rules or by creating entirely new rules or by modifying the provisions of existing rules to make them more adaptable to their circumstances.³⁸⁶ In order to achieve the maximum savings in speed and economy they can even decide to leave the entire procedural matter of the applicable law, rules and seat for the arbitrators to determine, either as “*amiable compositeurs*” or “*ex aequo et bono*.”³⁸⁷

Thus, if the parties desire FTA to be completed within two months they can make it a condition of the arbitration agreement.³⁸⁸ If they desire a documents-only arbitration, because they do not want to incur significant expense in having their dispute resolved, they can agree to that too.³⁸⁹ They can dispense with the disclosure of documents or the evidence of witnesses, and even a hearing if they wish.³⁹⁰ Conversely, if parties think that a dispute is likely to be technical and require full disclosure they might stipulate that.³⁹¹

³⁸³ Okekeifere (1998) p. 89

³⁸⁴ *Ibid*

³⁸⁵ Gelinis (1998) pp. 47-66

³⁸⁶ Welser/Wurzer (2008) p. 228

³⁸⁷ Born (2010) p. 95

³⁸⁸ Bagner (1997) p.193 Freyer (1998) pp. 104-112; Mustill (1993) p.121 See also Special Section: Fast-Track Arbitration, 2 Am. Rev. Int'l Arb. 137 (1991)

³⁸⁹ Merkin/Flannery/Barlow (2004) ¶15-3; Redfern/Hunter (2004) ¶6-104

³⁹⁰ Karton (2010) p. 6

³⁹¹ Hobeck/Mahnken/Koebke (2008) p. 84

Popular choices for expediting arbitration are:

'Documents only arbitrations'³⁹² – The arbitrator decides the issues of the dispute based only on written submissions from both parties without any pleadings or, sometimes, any hearing.

'Limitations on document production of documents'³⁹³ – Unlimited document production can bury both parties in mountains of paper, only part of which has any relevance to the issues.

'Look and sniff' arbitrations'³⁹⁴ – The issue is a physical thing that can be inspected, like the quality of commodity product or a construction material, and the arbitrator looks at the disputed issues in question and makes a binding determination within days of the dispute arising.

'Baseball arbitration' – After an exchange of written pleadings the arbitrators choose between two final offers submitted by the parties.³⁹⁵

'Sealed offers' – One party submits a written offer to the other in the hope of settling the dispute quickly. Though not recognized as standard practice in international arbitration it is known in common law practice. It encourages settlement because a party that refuses an offer but goes on to lose the arbitration will be liable for all costs of the arbitration accumulated after the date when the sealed offer was submitted.³⁹⁶

³⁹² CIArb Practice Guideline 5: Guidelines for Arbitrators regarding Documents-Only Arbitrations (06 December 2011)

³⁹³ Carter (2011) p. 4-9 See also IBA Rules on the Taking of Evidence in International Arbitration (29 May 2010); CIArb Protocol for E-Disclosure in Arbitration (October 2008)

³⁹⁴ Smid (1993) pp. 59 - 68

³⁹⁵ Krause/East (2009) p. 13

³⁹⁶ Though it is questionable whether this is an arbitration proceeding.

These rules may be selected from existing versions drafted by arbitration institutions or they may be created by the parties specifically for the agreement in question.³⁹⁷ The choice of a designated arbitral body is not mandatorily required.³⁹⁸ Under modern arbitration practice, parties either opt for ad hoc arbitration so that arbitrators can exercise more control over the arbitral procedure or parties can mix and match rules and institutions to their liking.³⁹⁹ In either case, because the parties are free to design their agreement in whatever way they choose, the arbitration agreement is the most fundamental opportunity for including binding measures aimed at reducing cost and time.⁴⁰⁰

3.2 Arbitrators are uniquely placed to change the pace of an Arbitration

After party autonomy, the focus of efforts to improve international arbitral procedure has generally been on the tribunal. As Greenwood observes, the inherent flexibility of arbitral procedure places the tribunal in a unique position to change the pace of arbitration.⁴⁰¹ According to her, the obligation of arbitrators is not only to observe due process and to issue a binding, enforceable award; it is also to conduct time and cost effective arbitral proceedings.⁴⁰² Accordingly it is commonly accepted that arbitration is only as good as its arbitrators.⁴⁰³

In the 2010 SIA/WC Survey, corporate counsel suggested that a strong tribunal can make all the difference to the conduct of arbitration by imposing a robust timetable and case-management. However detailed the arbitration

³⁹⁷ Lau/Horlach (2010) pp. 121-30

³⁹⁸ Tweeddale/Tweeddale (2007) p.89 (Aside from the tailor-made rules, the choice of the UNCITRAL Arbitration Rules by the parties is widely accepted as an adoption of the ad hoc arbitration)

³⁹⁹ Redfern/Hunter (2004) ¶13-44.

⁴⁰⁰ Tackaberry (1987) p. 219

⁴⁰¹ Greenwood (2010) p. 566

⁴⁰² *Ibid*

⁴⁰³ Lalive (1984) p. 27 (Prof. Lalive quotes 'an arbitration is worth what the arbitrator is worth')

procedures are, they can only accelerate arbitration if the tribunal manages to implement them.⁴⁰⁴

There are many examples of arbitral tribunals which have started with early case-management and active procedural controls, imposing short deadlines, with the intention of allowing time extensions only if parties can show that there is a clear, overriding reason for not meeting the deadlines, but then have deviated from this approach.⁴⁰⁵

In a 2006 article Marriott discussed streamlining the arbitral procedure in which he stressed the importance of arbitrators taking the initiative:

*“Judges and arbitrators must manage cases efficiently, be prepared to impose time limits and stick to them, refuse to accept evidence and submissions which are irrelevant or only of secondary or tertiary importance and, above all, be active and not passive.”*⁴⁰⁶

The ICC report on the Techniques for Controlling Time and Costs in Arbitration echoed these sentiments when it highlighted the need for proactive arbitrators with strong case management skills.⁴⁰⁷ The report emphasised the utility of a tribunal holding an early case management conference, recognising that:

*“The more information the arbitral tribunal has about the issues in the case prior to the case management conference, the better able it will be to assist the parties to devise a procedure that will deal with the dispute as efficiently as possible.”*⁴⁰⁸

⁴⁰⁴ Mustill (1989) p. 281

⁴⁰⁵ Park (2010) p. 27

⁴⁰⁶ Marriott (2006) p.411

⁴⁰⁷ Valverde (2006) p. 532

⁴⁰⁸ ICC Techniques (2007) para. 32

The more the arbitral tribunal reduces irrelevant issues arising during the procedure, the cheaper and quicker the procedure will become. Ideally, only those witnesses that the arbitrator approves should be heard. Furthermore, the tribunal alone should ask the experts questions or make sure that any questions at the witness conference are confined to issues relevant to the dispute. The pleadings and written witness statement should be taken as evidence in chief, which allows the other party to directly commence with its cross-examination.⁴⁰⁹

In many cases it is possible for the arbitral tribunal to agree with the parties on the total duration of the hearing. Moreover, the tribunal has the power to overrule the parties if it considers that the amount of time required by the parties is unreasonable.⁴¹⁰ The Iran-United States Claims Tribunal in 1981-4 was probably the place where this method was first introduced on a large scale.⁴¹¹ These tribunals used their discretion to apply many different techniques for controlling the time and cost of the arbitral proceedings.⁴¹²

As chairman of a 1996 ICC tribunal⁴¹³ and a 1999 ICSID tribunal,⁴¹⁴ Böckstiegel also used his discretion to inform the parties that each would be given a finite amount of time during the hearings.⁴¹⁵ Böckstiegel asked the parties to allocate the time 50/50 between them and to determine what they considered to be the best use of their time.⁴¹⁶ This approach later became characterized as the 'chess clock' or 'stop clock' system.⁴¹⁷ Even the ICC⁴¹⁸ encourages the use of these methods and it seems to be very efficient in complex cases in order to avoid lengthy hearings. In a large domestic

⁴⁰⁹ Davis (2004) p.3

⁴¹⁰ Megens/Cubitt (2010) p.7

⁴¹¹ Iran-US CTR, 1981-94 See also Iran-United, S. S. C. (1983)

⁴¹² Holtzmann (1995) pp. 39-50

⁴¹³ ICC Case No. 7314/1996, reported in Hascher (1997) p. 135.

⁴¹⁴ *Tradex Hellas S.A. v. Republic of Albania*, Award rendered on 29 April 1999, 14 ICSID Review-FILJ 161 (1999)

⁴¹⁵ Paulsson (2001) p. 607

⁴¹⁶ *Ibid*

⁴¹⁷ Burr/Karrer (2010) p.53-76

⁴¹⁸ Note on Expedited ICC Arbitration Procedure of 2002, p.38

arbitration case in Australia, stop clock arbitration made possible the hearing of 241 witnesses (including experts) in 54 days.⁴¹⁹

However, Rau & Sherman suggested in 1995 that unless arbitrators work full-time, resulting in more experienced, more professional and more confident arbitrators, the skills required to manage arbitration to tight deadlines might not be found.

*“Assigning substantial case-management functions to arbitrators would considerably affect the present system of selecting persons who have other careers and are willing to set aside a discrete block of time for an arbitration hearing, but are not prepared to be on call, as is a full-time judge, to rule on a multitude of prehearing matters and motions. Greater case management duties for arbitrators (or at least the chairman) seem inevitable, but that may require rethinking some of the basic premises of the traditional model.”*⁴²⁰

3.3 Statutory Provisions for Time and Cost Control

There is an inevitable conflict in every arbitration between, on the one hand, the desire of the parties and especially their counsel, to have unlimited time to put forward their case, and to leave no stone unturned when it comes to reviewing evidence and, on the other hand, the duty of the arbitrator to proceed within as short a time as possible.⁴²¹

The 1996 English Arbitration Act, while acknowledging the principle of party autonomy⁴²² and judicial minimalism,⁴²³ brought in a new statutory principle that the object of arbitration is to obtain “*the firm resolution of disputes by an*

⁴¹⁹ *Anaconda Operations Pty Ltd v Fluor Australia Pty Ltd* 2003 VSC 275 (28 July 2003) reported in Monichino (2009) p.76

⁴²⁰ Rau/Sherman (1995) p.89 -119

⁴²¹ Patocchi/Frey-Brentano (2005)

⁴²² English Arbitration Act of 1996, Section 1(b), 34(1)

⁴²³ English Arbitration Act of 1996, Section 1(c), 34(1)

*impartial tribunal without unnecessary delay or expense.*⁴²⁴ This aim is followed up in section 40⁴²⁵, which imposes on the parties a duty to “*do all things necessary for the proper and expeditious conduct of the arbitral proceedings.*”⁴²⁶ If a party fails to do what is necessary for the proper and expeditious conduct of the arbitration, arbitrators are given statutory power to enforce time limits.⁴²⁷

In particular, section 33(1)(b) contains a mandatory duty of the tribunal to: “*adopt procedures suitable to the circumstances of the particular case avoiding unnecessary delay or expense so as to provide a fair means for the resolution of the matters falling to be determined.*”⁴²⁸

In this context it is interesting to note the evolution which has taken place in arbitral laws and rules. The UNCITRAL Rules (Article 15)⁴²⁹, which date back to 1976, or the UNCITRAL Model Law (Article 18)⁴³⁰, which was adopted in 1985, envisaged that each party should be given a “*full opportunity*” of presenting its case. New rules and laws only provide for “*reasonable opportunity.*”⁴³¹ This obligation to avoid unnecessary cost and delay, while still granting the parties a reasonable opportunity to present their case, should now guide arbitrators when deciding on the most appropriate procedure. As Briner suggested:

⁴²⁴ *Ibid*

⁴²⁵ English Arbitration Act of 1996, Section 40; See also UNCITRAL Rules, Article 17(1); ICC Rules, Article 22(4); LCIA Arbitration Rules of 1998, Article 14(1)(i)

⁴²⁶ English Arbitration Act of 1996, Section 40

⁴²⁷ English Arbitration Act of 1996, Section 41

⁴²⁸ English Arbitration Act of 1996, Section 33(1)(b); See also Swedish Arbitration Act of 1999, Article 22 “the arbitrators shall handle the dispute in an impartial, practical, and speedy manner.”

⁴²⁹ UNCITRAL Rules, Article 17 provided “reasonable opportunity of presenting parties case” rather than keeping the concept of “full opportunity to presenting” the parties case in Article 15 of the UNCITRAL Arbitration Rules of 1976

⁴³⁰ UNCITRAL Model Law, Article 18 still envisages the terms “full opportunity of presenting “the parties case. See also German Arbitration Law of 1998, Article 1420

⁴³¹ Swiss Private International Law Act of 1989, Article 182; English Arbitration Act of 1996, Article 33(1) (a); Finnish Arbitration Act of 2003, Article 22; New French NCPC of 2011, Article 1510; ICC Rules, Article 22(4); LCIA Rules, Article 14(1)(i); UNCITRAL Rules, Article 17(1)

*“Arbitrators should be encouraged to insist that time limits requested by the parties are reasonable and not excessive and, especially, to be reluctant to allow extensions which are not really justified.”*⁴³²

3.4 Institutional Adaptation to speed and economy

Arbitral institutions have built on the foundations laid in the 1985 UNCITRAL Model Law⁴³³ but they have remained aware that proclaiming general principles is not enough to control time and cost. As is often the case, arbitration institutions have been more proactive than national parliaments and over the last 25 years have developed rules to clarify the extent to which parties are obliged to conduct arbitrations in a timely and economic manner, and the circumstances in which arbitral tribunals may be empowered to force parties to seek a more conciliatory approach.⁴³⁴

In 2007 the ICC produced a report called *Techniques for Controlling Time and Costs in Arbitration*,⁴³⁵ aimed at parties and their counsel. The report contains a useful summary of case management techniques such as bifurcation, limiting document requests, and limiting the length and scope of written submissions and witness evidence. It also emphasizes that:

*“Appropriate control of time and cost is important in all cases. In cases of low complexity and low value, it is particularly important to ensure that time and costs are proportionate to what is at stake in the dispute.”*⁴³⁶

⁴³² Briner (2000) p.143

⁴³³ UNCITRAL Model Law, Article 19 states that, in the absence of agreement between the parties, “the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.”

⁴³⁴ LCIA Rules, Article 14; AAA/ICDR International Arbitration Rules of 2009, Article 16 and UNCITRAL Rules, Article 17

⁴³⁵ ICC Techniques (2007)

⁴³⁶ ICC Techniques (2007)

In 2008, Rivkin showed that many arbitral institutions have improved their regular arbitration rules in such areas as securing faster appointment of the arbitral tribunal, requiring a case management conference as early as possible after the tribunal, coping with e-document production, ensuring parties remain cooperative and encouraging pro-active arbitrators.⁴³⁷

Institutions have also begun to require prospective arbitrators to confirm their availability. In Article 11(5) of the ICC Rules, arbitrators agree that:

*“By accepting to serve, arbitrators undertake to carry out their responsibilities in accordance with the Rules.”*⁴³⁸

Before August 2009, a prospective ICC arbitrator had to provide a declaration of acceptance, including a declaration of availability, which stated:

*“(...) I confirm that I (...) am able and available to serve as an arbitrator in accordance with all the requirements of those Rules (...).”*⁴³⁹

Practice showed that arbitrators did not always give sufficient attention to their availability when accepting to serve as an arbitrator. This frequently resulted in tribunals that were too busy to manage their cases in reasonable time.⁴⁴⁰

The ICC International Court of Arbitration responded in 2009 with a revised *“Statement of Acceptance, Availability and Independence”*, in which a separate section invites prospective arbitrators to specifically confirm their ability to devote the necessary time to the arbitration. The new form states:

“I confirm, on the basis of the information presently available to me, that I can devote the time necessary to conduct this arbitration diligently, efficiently and

⁴³⁷ Rivkin (2008)

⁴³⁸ ICC Rules (1998), Article 7(5); ICC Rules, Article 11(5)

⁴³⁹ Derains/Schwartz (2005) p. 423

⁴⁴⁰ Fry/Greenberg (2009) p. 12; McIlwrath (2010) p.533

*in accordance with the time limits in the Rules. I understand that it is important to complete the arbitration as promptly as reasonably practicable and that the ICC Court will consider the duration and conduct of the proceedings when fixing my fees (Article 2(2) of Appendix III to the Rules). My current professional engagements are as below for the information of the ICC Court and the parties.”*⁴⁴¹

Thus, a prospective arbitrator is now required to declare the cases in which they are involved as sole arbitrator, tribunal chair, co-arbitrator or counsel as well as any foreseeable conflicting demands in the following eighteen months.⁴⁴² Upon its introduction on 17 August 2009, it was clearly stressed that “*genuine concerns about availability*” may cause the ICC Court not to confirm or appoint an arbitrator.⁴⁴³ The statement reminds prospective arbitrators of the seriousness of their agreement, and this is reflected in the consequences for an arbitrator who slows the pace of proceedings, as the ICC can impose financial penalties upon recalcitrant arbitrators and, as a last resort, can even require the removal of such arbitrators.⁴⁴⁴

Since the introduction of the new form, the ICC Court has three times exercised its right not to confirm prospective arbitrators who in the Court’s eye appear not to be sufficiently available.⁴⁴⁵ In one case the prospective arbitrator stated that he was involved in over 20 cases.⁴⁴⁶

In another case, the prospective chairman disclosed that he would shortly be on a sabbatical for a period of 4 months.⁴⁴⁷ In this case the co-arbitrators accepted the availability limitations and none of the parties raised any objections to the confirmation of the prospective chairman within the time limit

⁴⁴¹ ICC Arbitrator Statement of Acceptance, Availability and Independence (2010); See also Article 2(3) of the IBA Rules of Ethics for International Arbitrators.

⁴⁴² Wilske (2009) p.199

⁴⁴³ ICC Court Press communication of 17 August 2009, Introduction of new Statement of Acceptance, Availability and Independence for arbitrators

⁴⁴⁴ *Ibid* ICC takes tougher stance on arbitrator availability ICC Press Release (August 2009).

⁴⁴⁵ Hauser-Morel (2010) p.27

⁴⁴⁶ Fry/Greenberg (2009) p.22

⁴⁴⁷ *Ibid* p.24

granted. The ICC Court, however, decided not to confirm the nominee, considering that the possibility that one of the parties will require interventions or actions during the sabbatical stage, and that the arbitral tribunal would not be able to deal with such cases.⁴⁴⁸

In one FTA case the ICA Court of the ICC, was aware of the availability problems of proposed arbitrator who had submitted the Statement of Acceptance, Availability and Independence.⁴⁴⁹ The ICC required him to pull back from the position and thus resolved the problem without having to refuse the appointment. In fact, the ICC Court had the power under Article 11(4) of the ICC Rules not to confirm the said person as sole arbitrator or chairman.⁴⁵⁰

With respect to lengthy document disclosure requests, the International Centre for Dispute Resolution (ICDR) showed its commitment to expeditious arbitration in 2008 by issuing *The ICDR Guidelines for Arbitrators Concerning Exchanges of Information*.⁴⁵¹

The most recent step in the evolution time and cost effectiveness of ICA was the publication of the revised ICC Rules on September 12, 2011, which came into effect in January 2012. Article 22(1) of the new ICC Rules states:

*“The arbitral tribunal and the parties shall make every effort to conduct the arbitration in an expeditious and cost-effective manner, having regard to the complexity and value of the dispute.”*⁴⁵²

Article 22(1) thus contains an explicit contractual obligation on the parties to conduct their arbitration in a ‘proportionate’ manner. More often than not, however, when large sums of money are at stake and experienced counsel are engaged on both sides, at least one of the parties has an incentive to

⁴⁴⁸ *Ibid* p.24

⁴⁴⁹ *Ibid* p.26

⁴⁵⁰ ICC Rules, Article 11(4); ICC Rules (1998), Article 7(4)

⁴⁵¹ ICDR Guidelines for Arbitrators Concerning Exchanges of Information of 2008

⁴⁵² ICC Rules, Article 22(1)

behave as though they were litigating, with all its attendant cost and delay. Once a dispute has arisen, it is unrealistic to expect either party to act contrary to its self-interest in pursuit of the 'higher ideal' of arbitral efficiency. In such situations, time and costs are best kept in check by empowering tribunals to make case management decisions on the basis of 'proportionality', which means an appropriate speed for an appropriate case. The existence of such a power is common to most modern sets of rules⁴⁵³ and is contained in Article 22(2) of the new ICC Rules:

*"In order to ensure effective case management, the arbitral tribunal, after consulting the parties, may adopt such procedural measures as it considers appropriate, provided that they are not contrary to any agreement of the parties."*⁴⁵⁴

The innovation with regard to case management in the new Rules is Article 24, which makes it mandatory for the tribunal to convene an initial *"case management conference to consult the parties on procedural measures"*⁴⁵⁵ which may be held *"in person, by video conference, telephone or similar means of communication."*⁴⁵⁶ Article 24 also suggests that the tribunal may adopt one or more of the case management techniques described in Appendix IV.⁴⁵⁷

Although the case management techniques set out in Appendix IV and the above-mentioned improvements will be familiar to all experienced arbitration practitioners, Friedland⁴⁵⁸ observes that the codification of time and cost-effectiveness in ICA fulfils at least two important functions. First, it can reasonably be expected that the explicit encouragement to use such

⁴⁵³ LCIA Rules, Article 14; AAA/ICDR International Arbitration Rules of 2009, Article 16; UNCITRAL Rules, Article 17

⁴⁵⁴ ICC Rules, Article 22(2)

⁴⁵⁵ *Ibid*, Article 24

⁴⁵⁶ *Ibid*, Article 24

⁴⁵⁷ *Ibid*, Appendix IV See also ICC Techniques (2007)

⁴⁵⁸ Friedland (2011)

techniques will increase their use by less experienced arbitrators.⁴⁵⁹ Second, the explicit enunciation of case management techniques serves further to legitimize their use and hence to prevent awards being challenged on due process grounds.⁴⁶⁰

Notwithstanding all these improvements, quite recently in 2012, a new task force was created within the ICC Commission on Arbitration, co-chaired by Bernard Hanotiau and Julian Lew, to analyse why delays and costs still arise, and to provide the arbitral community with new recommendations.⁴⁶¹

While arbitral institutions have been making great strides in limiting cost and delay it would be an exaggeration to give them all the credit for the recent development of expedited procedures.⁴⁶² The UNCITRAL has also brought about changes in arbitral culture. In 2010, after years of deliberation, the UNCITRAL Working Group II submitted a revised text of the UNCITRAL Arbitration Rules. While remaining faithful to the structure and drafting style of the first version, the revisions seek to enhance the time and cost effectiveness of UNCITRAL arbitration and to reflect the use of modern technology.⁴⁶³

Several articles of the 2010 UNCITRAL rules acknowledge developments in communication which allow faster processing. Article 1 eliminates the requirement that the parties must agree in writing that the UNCITRAL rules will apply to the arbitration⁴⁶⁴. Agreements can now be made by phone, email, or any other medium, providing proof of the agreement is available.⁴⁶⁵ According to article 2 electronic transmissions is acceptable for all arbitral communication. Any communication transmitted electronically is deemed to have been received on the day it is sent, except in the particular case of the

⁴⁵⁹ *Ibid*

⁴⁶⁰ *Ibid*

⁴⁶¹ ICC's Consultative task force on the role of parties and their in-house counsel in international arbitration

⁴⁶² Hanessian/Hayden/Muniz (2012) p.11

⁴⁶³ Moss (2010) p.96

⁴⁶⁴ UNCITRAL Arbitration Rules of 1976, Article 1

⁴⁶⁵ UNCITRAL Rules, Article 1(1)

notice of arbitration, which is deemed to have been received on the day when it reaches the addressee's electronic address.⁴⁶⁶ Article 3 provides that the constitution of the arbitral tribunal shall not be hindered by any controversy with respect to the sufficiency of the notice of arbitration, which shall be finally resolved by the arbitral tribunal.⁴⁶⁷

The new UNCITRAL Rules, like the LCIA and ICC Rules, give arbitrators and parties a mandatory duty to reduce delay. Article 17 makes clear that the tribunal shall conduct the proceedings so as to avoid unnecessary delay and expense and shall establish a provisional timetable as soon as possible.⁴⁶⁸ Additionally, it prescribes that the arbitral tribunal, as soon as practicable after its constitution and after inviting the parties to express their views, shall establish the provisional timetable of the arbitration.

Some of the new UNCITRAL Rules offer arbitrators the means to take control of time and cost.⁴⁶⁹ Article 28(4) states that the tribunal may direct that witnesses, including expert witnesses, may be examined through means of telecommunication (such as videoconference) that do not require their physical presence at the hearing.⁴⁷⁰

The International Bar Association (IBA) is another organisation concerned with the time and cost of arbitral proceedings. In 1999 a working group of the IBA, comprising both common law and civil law experts published revised version of the IBA Rules of Evidence in International Commercial Arbitration.⁴⁷¹ The revision gained popularity because critically, according to Gaillard, the committee who made the revisions had sufficient first-hand experience to understand what was needed to create speedy time and cost

⁴⁶⁶ *Ibid*, Article 2(2)

⁴⁶⁷ *Ibid*, Article 3(5)

⁴⁶⁸ *Ibid*, Articles 17(1) and 17(2)

⁴⁶⁹ Ong (2011); Samaras (2011)

⁴⁷⁰ UNCITRAL Rules, Article 28(4)

⁴⁷¹ IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999

effective arbitral proceedings.⁴⁷² This encouraged the IBA to introduce new updates in 2010 to cover evidentiary representation in arbitration,⁴⁷³ in particular the new challenges and opportunities presented by the disclosure and production of electronic documents as evidence.⁴⁷⁴ It also for the first time suggested “*proportionality*” as a consideration for arbitrators to reduce cost and delay in ICA.⁴⁷⁵

There have also been joint efforts between arbitrators, counsel and parties such as the Centre for Effective Dispute Resolution (CEDR), which in 2009 issued the *CEDR Rules for the Facilitation of Settlement in International Arbitration*. In the United States, the College of Commercial Arbitrators (CCA) introduced *Protocols for Expeditious, Cost-Effective Commercial Arbitration*.⁴⁷⁶ In England, the Chartered Institute of Arbitrators, (CI Arb) published *Protocol for E-Disclosure in Arbitration (2008)* and *Guidelines on the Interviewing of Prospective Arbitrators*. CI Arb’s *Cost in International Arbitration Survey* revealed significant facts about time and cost-effectiveness of ICA. Valuable observations about the experiences of practitioners’ counsel and arbitrators since 2006 were reported in the School of International Arbitration’s bi-annual surveys on ICA.

To avoid unnecessary costs, discussing the conduct or progress of the arbitration can be done by telephone or video conferences instead of forcing parties to physically meet.⁴⁷⁷ The contribution of information technology is essential to saving time and money as, for example, witnesses and experts are heard by use of videoconferences.⁴⁷⁸ Olympic arbitrations since 2004

⁴⁷² Gaillard (2005) p.142

⁴⁷³ IBA Rules on the Taking of Evidence in International Arbitration of 2010

⁴⁷⁴ Kühner (2010) p.668

⁴⁷⁵ IBA Rules on the Taking of Evidence in International Commercial Arbitration of 1999 Preamble para. 1

⁴⁷⁶ Stipanowich (2010)

⁴⁷⁷ Schneider/Kuner (1997) p.10

⁴⁷⁸ Schultz (2006) p.14

Olympics have often made use of such technology and almost all arbitral institutions in today's world make good use of IT.⁴⁷⁹

The ICC began to operate electronic case management system as early as 1989.⁴⁸⁰ This immediately provided a solution to the one of the major problems of international arbitration, namely the excess of documents and evidences which cause significant cost and delays.⁴⁸¹ Case management techniques to reduce time and costs are continually being considered.⁴⁸² For example, the WIPO introduced an Electronic Case Facility which enables secure filing, storing and retrieval of case-related submissions and remote electronic case management.⁴⁸³ In November 2005, the ICC launched its *Net case* facility to enable arbitrations to be conducted in a secure online environment.⁴⁸⁴ The increasing use of electronic communication can have a major impact on putting limits on the disclosure of documents.⁴⁸⁵

3.5 Guidelines on Counsel Conduct

Because ICA is a service, parties have every right to expect a cost-effective procedure. What really costs in arbitration is not air tickets, hotels, restaurants, or court reporters, it is the time spent on the case by lawyers and corporate management. It is quite simply unethical for lawyers or arbitrators to sit on cases so that they can charge more hours.

Some major international law firms publish declarations to their clients and practitioners confirming they will make every attempt to reduce the time and

⁴⁷⁹ Schneider (1994) p.119 p. 119 *et seq.*

⁴⁸⁰ Davis (1998) p.16

⁴⁸¹ Wahab (2004) p. 143

⁴⁸² Butler (1994) p.263-269

⁴⁸³ Smith (2010) p.177

⁴⁸⁴ *Ibid*

⁴⁸⁵ Smit (2010) p.201

cost of arbitration.⁴⁸⁶ Rivkin, co-chair of the International Dispute Resolution (IDR) Group, explains the purpose of the protocol:

*"We have always focused on conducting our arbitrations in the most efficient manner possible. We believe that this approach is strongly in our clients' interests, and we hope that, ... this public commitment ... will encourage others to work with us in improving the international arbitration process."*⁴⁸⁷

Clients are increasingly unwilling to use outsourced legal research and instead expect customized attention from its legal counsel, be it in house or external.⁴⁸⁸ Many law firms now offer fixed fees structures for different dispute resolution methods.⁴⁸⁹ Many include specialists in ADR to resolve matters as early as possible.⁴⁹⁰ Other law firms are revising their fee structure to be able to offer cost saving options such as ⁴⁹¹ sliding scales⁴⁹² or contingency fees⁴⁹³ instead of the hourly charge-out rate.

In 2008, a significant step came from the IBA's Arbitration Committee, which formed a task force to investigate the different ethical and cultural standards and disciplinary rules that apply to counsel in international arbitrations. The mandate is to create a code of conduct in international arbitration, including the issues of excessive costs and long delay in arbitration. In August 2010, the IBA's task force conducted a survey seeking views on the impact of ethical constraints on arbitral proceedings, including views on specific cases.

⁴⁸⁶ Debevoise & Plimpton LLP (2010) (Through the Protocol, the firm expresses its commitment to explore with its clients how such procedures may be applied in each case.)

⁴⁸⁷ Rivkin (2010)

⁴⁸⁸ Bernard (2010) p. 165

⁴⁸⁹ Transactional work usually is "classified as cooperative in nature" as compared to commercial litigation. "Advising and counselling clients" about "planning transactions in light of legal rules" comprise the core functions of the counsellor-at-law. See more on O'Neil (2009) p.73

⁴⁹⁰ Hoffman (2008) p.11

⁴⁹¹ Conference: Arbitration Roundtable of Toronto. (2008). An Arbitration Primer for Corporate Counsel and Business Lawyers

⁴⁹² Walker (2005)

⁴⁹³ Rogers (2008) p.1039

The survey has received considerable attention. Proponents maintain that a code of conduct for counsel in international arbitrations would bring greater integrity and certainty to the practice of international arbitration and level the playing field for practitioners from different jurisdictions and legal traditions.⁴⁹⁴ Detractors remain sceptical about the need for any such code of conduct, believing it would only lead to confusion.⁴⁹⁵

A code of conduct for counsel in international arbitration certainly raises numerous issues.⁴⁹⁶ As Born asks:⁴⁹⁷ What would be the character of such a code? Would the code purport to be binding and, if so, by what legal mechanism? Alternatively, would the code be non-binding, but instead suggest best practices which would provide guidance but no more? Similarly, what mechanisms would need to exist to enforce a code of conduct for counsel in international arbitrations? And who would enforce it – national courts, national bar associations, or international arbitral tribunals?

Questions will also arise, according to Rogers, as to the relationship between any international code of conduct and national rules of professional responsibility.⁴⁹⁸ In many jurisdictions, counsel's conduct in an international arbitration is subject to obligations imposed by his or her local bar. What should be the relationship between these national rules of professional responsibility and an international code of conduct designed specifically for international arbitral proceedings?

These questions have recently been answered in the IBA Guidelines on Party Representation in International Arbitration of 25 May 2013.⁴⁹⁹ These guidelines are inspired by the principle that party representatives should act with integrity and honesty and should not engage in activities designed to

⁴⁹⁴ ICCA Congress Series No. 15 (Rio 2010)

⁴⁹⁵ Conference: Generations in Arbitration VII - Art of Advocacy, (26 March 2010) ICC-YAF roundtable in Paris

⁴⁹⁶ Born (2010)

⁴⁹⁷ *Ibid*

⁴⁹⁸ Rogers (2001) p.473

⁴⁹⁹ available at http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

produce unnecessary delay or expense, including tactics aimed at obstructing the arbitration proceedings.⁵⁰⁰ It is unlikely that these guidelines will provide a widespread solution to the issue of dilatory tactics in ICA. However, at the very least, such guidelines may be the impetus for parties and tribunals to agree a common standard for addressing speed and economy early on, rather than leaving it until just before the hearing, or, as is often the case, not addressing the point at all and employing dilatory tactics.

3.6 Concluding Remarks

Many time and cost saving techniques are available for ICA but they provide speed and economy within the narrow concept of reducing unnecessary cost and delay. This does not allow the promotion of more speed or more economy that some international commercial disputes currently demand. Methods for expediting regular arbitration proceedings are being kept to a reasonable minimum in order not to overload the rules of a given institution and not to adversely affect the flexibility of arbitral proceedings. Arbitral proceedings can in many cases restrict the number of written briefs, document production and long witness statements and impose time limits for the filings of such briefs and witness lists. But using any one of those technics is not enough for providing the speed and economy that many international commercial disputes demand. Thus FTA was suggested as a cure to those international commercial disputes in which increased speed and economy is more openly offered to international business users.

⁵⁰⁰ IBA Arbitration Newsletter 17(2)(2012, September), pp.10-14

4 FAST-TRACK ARBITRATION AS A PARADIGM

The emergence of fast-track arbitration (FTA) is a fundamental development in both international and domestic arbitration and clearly reflects the increased cost-consciousness of disputants and their desire to resolve disputes even more quickly than methods of expediting regular arbitration proceedings.⁵⁰¹

4.1 Definition of Fast-track Arbitration

While many attempts have been made over the years to increase the speed and economy of international commercial arbitration, before 1990 there was no uniform understanding of FTA in the arbitration literature.⁵⁰² Practitioners used many methods for improving speed in arbitration without labelling it as FTA until Davis created a definition in 1993.⁵⁰³

Davis defined three types of procedures for increasing speed in arbitration (i) fast-track arbitration; (ii) expedited arbitration; and (iii) accelerated arbitration.⁵⁰⁴ He differentiated the procedures according to when and how the parties agree to expedited rules. Thus, "*Fast-track arbitration*" (according to Davis) is established in the arbitration clause within the main commercial contract regardless of whether any dispute may eventually exist.⁵⁰⁵ "*Accelerated arbitration*" is established in the submission agreement after the dispute but before establishing the arbitral tribunal.⁵⁰⁶ "*Expedited arbitration*" uses ready-made institutional rules, and parties may opt into these rules either before the dispute by way of their arbitration clause which refers to the

⁵⁰¹ Magnusson (2001)

⁵⁰² Frick (2001) p.243

⁵⁰³ FTA was first defined as arbitration conducted pursuant to an arbitration agreement in which "the parties select a subset ... of disputes from the universe of potential disputes and agree that, if a dispute in this category arises, it will be resolved within a non-extendable time limit." Davis/Lagace/Volkovitsch. (1993) p.70 n.2

⁵⁰⁴ Davis/Lagace/Volkovitsch (1993) p. 70

⁵⁰⁵ *Ibid* p.70 fn 2

⁵⁰⁶ *Ibid* p.70 fn 2

specific set of institutional expedited rules, or after the dispute has arisen by way of the submission agreement to the arbitral institution.⁵⁰⁷

In 1998, Freyer⁵⁰⁸ accepted Davis' definition of *expedited arbitration* as arbitration which uses ready-made institutional FTA rules. But instead of making two further divisions he combined Davis's definitions of *fast-track arbitration* and *accelerated arbitration* and suggested the term "*modified arbitration*" for all fast-track procedures, whenever agreed by the parties.

These two authors drew a distinction between different fast-track methods in order to see which worked best. However, their categorizations did not gain wide approval from the arbitration community because they complicated the simple concept of "fast-tracking" international commercial arbitration which covered all measures aimed at increasing speed and reducing cost. A more recent definition is given by McIlwrath & Savage in 2010. FTA is:

*"an arbitration where the parties have agreed, either in their contract or when a dispute arises, to a form of accelerated or 'fast-track' procedure, the goal of which is to have the dispute resolved by an award rendered in a period of months, weeks, or even days."*⁵⁰⁹

This thesis defines FTA as arbitration where the parties have chosen to adopt an agreement with the specific aims of increasing speed and reducing cost, and where it is understood that the fast-track procedures to achieve these aims may restrict parties' options in other areas. Any arbitration that falls outside this definition of FTA is defined as "regular arbitration" according to this thesis. Furthermore, any attempt to increase speed and economy in only one area or procedural stage is, under this thesis, a method for expediting regular arbitration.⁵¹⁰

⁵⁰⁷ *Ibid* p.70 fn. 2

⁵⁰⁸ Freyer (1998) p.104

⁵⁰⁹ McIlwrath/Savage (2010) p.277

⁵¹⁰ Redfern/Hunter (2004) ¶6-43

4.2 The development of institutional FTA rules

4.2.1 Early suggestions for improving the speed of arbitration

Before 1990, arbitration authorities made several suggestions for improving the speed and reducing the cost of regular arbitration but they did not call it FTA.

In 1987, Rubino suggested using a sole arbitral tribunal instead of three arbitrators, a limited option of appeal and a time frame with a maximum of two years.⁵¹¹ In this system, except in special cases, the arbitration clause should provide one arbitrator with a mandate to complete the dispute within one year. This arrangement could be supplemented with an appeal arbitration panel. He proposed a three-member appeal panel with the power to transfer the appealed award to the winner, in whole or in part, if the first instance award was confirmed. Alternatively, the appealed award could be returned to the loser if the award decision was reversed within one year.⁵¹² Rubino also proposed that the placing of a security deposit would be a condition of making an appeal, in order to eliminate spurious dilatory appeals by the losing party.⁵¹³

Unfortunately the appeal procedures which Rubino advocated often led in practice to additional disputes, for instance regarding alleged procedural errors or whether the appellate tribunal had the authority to review some of the issues.⁵¹⁴ Moreover, in cases where one party does not accept an award in the first instance, it almost certainly would refuse to pay the deposit proposed by Rubino and decline to follow an appeal procedure. Instead, it would probably choose litigation to obstruct enforcement based on the

⁵¹¹ Rubino-Sammartano (1987) p. 76 See also Rubino-Sammartano (1990) p. 27

⁵¹² *Ibid* 78

⁵¹³ *Ibid* 79

⁵¹⁴ Frick (2001) p.260

reasons listed in Article 5 of the NYC. So whether Rubino's proposition represents time and cost saving is questionable.⁵¹⁵

Schneider, in 1989, introduced the term "*lean arbitration*"⁵¹⁶ which describes a situation where arbitrators are active in promoting speed and economy rather than waiting for the parties to request expedition. Schneider suggests that "*lean arbitration*" would work best when issues relating to procedure are clearly identified at the outset, rather than leaving them to be determined during the arbitral process.⁵¹⁷

Schneider also proposed that the objectives of speed and economy are best served if, as early as possible, arbitrators itemise the cost of each procedural step. The intention was to encourage economy by clearly showing the savings to be made from conducting, say, a main hearing in one day rather than seven, or the savings that could be made by documents only witness statements and limited cross-examination in the hearing.⁵¹⁸ However, this approach has not received acceptance as in the majority of cases arbitral proceedings are determined as the case unfolds and the cost of arbitration is calculated last, after the closure of proceedings.⁵¹⁹

Redfern and Hunter, in 1991, also suggested methods for improving speed, called "*streamlined proceedings*" which, they suggested, should be codified in the procedural rules of arbitral institutions.⁵²⁰ According to them, institutions are best placed to offer streamlining techniques because at the start of arbitration the arbitral tribunal has insufficient knowledge of the parties'

⁵¹⁵ See for contrary discussion Knull/Rubins (2000) pp.531-607 See also The ICSID Convention Article 53 and ICSID Arbitration Rules Articles. 50-55; Centre for public resources (CPR) rules for non-administered arbitration of international disputes (2000) and the CPR arbitration appeal procedure (2000). Johnson (1991) p. 39; Grain and feed trade association (GAFTA) arbitration rules, rule 10; Coffee trade federation (CTF) arbitration rules, rule 40; London rice brokers' association (LRBA) arbitration rules, rule iii.

⁵¹⁶ Schneider (1994) pp.119-140

⁵¹⁷ *Ibid* 121

⁵¹⁸ *Ibid* at 138

⁵¹⁹ Greenwood (2010) p. 563

⁵²⁰ Redfern/Hunter (1991) p. 342

position regarding the most appropriate arbitral proceedings in a particular dispute. Instead, arbitral institutions could adopt various procedural rules to increase speed and offer them as a separate or semi-separate system so that parties may pick and choose which measures to employ rather than accepting regular procedural rules. This would require that the parties agree beforehand which system to use. Alternatively, institutional rules could be drafted in such a way that arbitrators are granted the authority to determine which system to use.⁵²¹ Redfern and Hunter made many suggestions for institutional rules which might streamline arbitral procedures, some of these are:⁵²²

- only a sole arbitrator should be appointed;
- exact and unyielding time limits should be strictly imposed;
- the arbitrator should, first and foremost, identify the most significant points at issue, determine the extent of direct witness testimony and allocate the total time available for witness statements and responses between the parties before the hearing;
- the arbitrator's award should not contain extensive reasoning.

Uff, in 1993, addressed the question of whether and by what means arbitration can be made economically viable.⁵²³ He suggested that arbitrators have wide powers and that if arbitration procedures are to be radically improved, the initiative must come from the arbitrators.

He suggested that arbitrators should:

- become sufficiently acquainted with the issues at an early stage
- not regard themselves as bound by any of the rules or procedures of the local court

⁵²¹ Redfern/Hunter (2004) ¶¶6-47

⁵²² *Ibid*

⁵²³ Uff (1993) pp.31- 39

- consider requesting a written or oral presentation from each side aimed at defining the principal issues to be addressed in the arbitration.
- consider from the earliest possible date how the arbitration is to proceed.
- consider whether, and to what extent, oral hearings are necessary or appropriate
- have regard to the sums of money in issue, the complexity of particular issues in order to determine the appropriate speed for the case.

Uff's suggestions have been widely used and most current FTA rules give arbitrators broad authority expedite arbitral proceedings.

4.2.2 The modern concept of FTA

FTA as a separate system, rather than as a method for expediting regular arbitration was first seriously considered in 1991 when an ICC tribunal used its regular arbitration rules to administer two related cases under a "*fast track procedure*". The value in dispute was several \$100 million and the two arbitrations were completed in only 60 and 80 days.⁵²⁴

The two cases were unrelated but both concerned the redetermination of the purchase price for a gas supply agreement.⁵²⁵ These cases combined the classic characteristics of complex international arbitral proceedings with the added pressure of an extremely tight deadline.⁵²⁶ The arbitral tribunal had to deal with difficult procedural issues including the challenge of an arbitrator, the drawing up of terms of reference, questions as to the extent of its jurisdiction and the merits of the dispute, exchange of memorials, hearing the witnesses

⁵²⁴ ICC Final Award in Cases No. 7385 and No.7402 (1992, January 7), pp.68-79

⁵²⁵ *Ibid*

⁵²⁶ Davis (1992)

and parties, and the approval of the award by the ICC. Despite these complications the tribunal managed to conduct the FTA with remarkable speed and the notification of the final award was given to the parties on the day of approval.⁵²⁷

Surprisingly, some of the lawyers involved in drafting the FTA clause did not believe it would be possible to successfully conclude an international commercial arbitration within the time limit of 60 days which was part of the arbitration agreement. The main purpose of the FTA clause was that, in case of a dispute, the parties should reach a voluntary settlement as opposed to an award being made.⁵²⁸ In the end fast-track proceedings succeeded because of the will of the parties, the sophistication of the tribunal and the efforts of the ICC Court and its Secretariat.⁵²⁹

The following year saw an arbitration that was fast-track in every sense of the word. In 1992, immediately before a Grand Prix race, a dispute developed between the host of the Formula 1 championship and a racing team regarding the proper varnishing of two race cars.⁵³⁰ A prompt decision was required and the ICC Arbitration Court delivered. The award was rendered just 38 days after arbitration proceedings were begun, allowing the racing team to participate in the Grand Prix.⁵³¹

In order to foster fast-track dispute resolution, in 1992, Rovine suggested that arbitral institutions should establish ready-made FTA rules with the specific

⁵²⁷ For commentaries about this cases Rovine (1995) pp. 286-288 See also *Fast-Track Arbitration: Different Perspectives*, ICC Bulletin, Vol. 3, No. 2, at 4 (1992), with the contributions of Benjamin Davis (*The case viewed by a counsel at the ICC Court's Secretariat*), Peter J. Nickles, Moses Silverman and David K. Watkiss (*Three perspectives from the parties' counsels*), and Hans Smit (*A chairman's perspective*) and the contributions of the same authors in 2 Am. Rev. Int'l Arb 138 *et seq.* (1991); Davis (1992); Rovine (1992); Downie (1991); See also the contributions made during the 1993 Geneva Global Arbitration Forum on the theme of "*The drive towards speedier arbitral justice*" by Tschanz (1993); Smid (1993); and Davis/Lagace/Volkovitsch (1993). On other means of accelerating the arbitral proceedings, see, for example, Holtzmann (1995)

⁵²⁸ Silverman (1993) p.116

⁵²⁹ *Ibid* See also Frick (2001) p.243

⁵³⁰ ICC Case No 10211/AER reported in Redfern/Hunter (2004) ¶¶6-44

⁵³¹ Broichmann (2008) p. 143.

aims of increasing speed, economy and fairness, and balancing the requirements of all three.⁵³² Such rules could: allow the institution to propose a sole arbitrator in the absence of agreement by the parties; set time limits for filing answers and reduce challenges; allow fewer submissions than normal from parties - perhaps one from each side - and these should be submitted simultaneously; give arbitrators the discretion to rule on whether witnesses are needed at the hearing and whether any document production should be permitted. The ICC refused to take up Rovine's suggestion of creating a separate set of FTA Rules, preferring to conduct FTA under the auspices of its regular arbitration rules.

In 1993 four international commercial arbitration cases with a significant value were initiated under the ICC,⁵³³ two of which were governed by pre-dispute FTA arbitration clauses and two were to be settled by fast-track procedures agreed through the ICC's after the dispute had arisen.⁵³⁴ This shows the growing popularity of fast-track proceedings and the ICC's eagerness to allow parties to agree on fast-track, before or after the dispute had arisen, according to its regular arbitration rules.

In the 1990s international commercial arbitration was being heavily criticised by many arbitration users for its excessive cost and delay.⁵³⁵ There had been many calls for better procedures to be developed, but few constructive proposals. As a result the previous FTA cases gained prominence among the wider arbitration community and served as a model for a variant form of arbitration.⁵³⁶

In 1994, the WIPO, in accordance with Rovine's suggestion, introduced a separate set of FTA rules which applied time limits to various stages of the

⁵³² Rovine (1992) pp.45-57

⁵³³ Smit (1991) pp.138-142

⁵³⁴ Verbist (1993) pp. 537; Downie (1991) pp. 473; Davis (1992) pp. 43; Imhoos (1992) p. 135; Davis/Ezratty (1992) p.142; Rovine (1992) p.45

⁵³⁵ ICCA Congress Series No 5 (1990)

⁵³⁶ Smit (1991) pp.138-142

arbitral proceedings and condensed proceedings before a sole arbitrator.⁵³⁷ A year later the SCC also introduced a separate set of FTA rules.

The ICC responded to Rovine's demands with the administrative function of its secretariat but no specific FTA rules were implemented until 1998.⁵³⁸ Thereafter, Article 32 of the 1998 ICC Arbitration Rules specifically gave parties the right to shorten time limits and deadlines under its regular arbitration rules.⁵³⁹ The ICC also published *Notes on ICC Expedited Arbitration* to illustrate the suitability of the ICC's regular arbitrations to support FTA.⁵⁴⁰ Similarly, the LCIA adopted Articles 9 and 14 in its 1998 Rules which enabled parties and the arbitral tribunal to conduct a fast-track procedure by the effective use of regular arbitration rules.⁵⁴¹

In 2004, the Swiss Chambers introduced the automatic application of expedited arbitration rules for all arbitrations referred to them below 1 million Swiss francs.⁵⁴² They were largely based on rules that existed in the arbitration rules of the Chambers of Commerce of Basel (Article 41 Basel Rules), Geneva (Article 31 CCIG) and Lugano (Article 48 Lugano Rules). All of these chambers later joined under the Swiss Chambers Arbitration Institutions (SCAI) in 2004.⁵⁴³ In the same year the FCC introduced separate FTA rules. Many arbitration institutions, especially in Asia and the Pacific, then adopted this approach. CIETAC and JCAA, for instance, were among the first institutions to adopt separate sets of expedited arbitration rules. Today almost all arbitration institutions offer specific set of rules to support FTA.⁵⁴⁴

⁵³⁷ WIPO Expedited Arbitration Rules of 1994

⁵³⁸ Philippe (2002) p.253

⁵³⁹ Philippe (2002) p.253

⁵⁴⁰ Note on Expedited ICC Arbitration Procedure of 2002, p.29

⁵⁴¹ LCIA Rules, Article 9

⁵⁴² SCAI Rules, Article 42 (2); SIAC Rules, Article 5(1)(a) (if the amount in dispute does not exceed the equivalent amount of S\$5,000,000); See also CIETAC Rules, Articles 54-62 (sets a superior limit at RMB 2,000,000)

⁵⁴³ SCAI Rules, Article 42

⁵⁴⁴ See Appendix 2 for the chronological list of institutions that enacted FTA Rules.

In the new millennium, there are three main approaches to fast-tracking international commercial arbitration.⁵⁴⁵

In the first, according to the ICC and LCIA, FTA does not require special rules, but can be performed by merely adapting regular arbitration rules. This approach was formalised by the ICC and the LCIA in their 1998 Arbitration Rules and followed by the ICDR and the UNCITRAL Arbitration Rules. Under this approach the time limits of regular arbitration proceedings are reduced in the arbitration agreement, or by a fast-track procedure is created in consultation with the tribunal. The latter occurs in the terms of reference if it is an ICC arbitration or before commencing the process if it is an LCIA arbitration.

The second approach to fast-tracking is based on a set of special FTA rules which supplement the common procedure rules. Many international institutions have created special FTA rules, such as the Expedited Arbitration Rules of the SCAI, the Summary Arbitration Procedures of the CIETAC and, more recently, the 2007 Fast Track Arbitration Rules of the Institute of Arbitrators and Mediators of Australia (IAMA). The advantage of this approach to business users is that FTA procedures can be automatically applied to cases below a certain monetary threshold and that ready made fast-track procedures provide guidance to both parties and arbitrators.

The third approach is to create FTA rules which stand completely apart from regular arbitration rules. This approach, pioneered by the SCC and the WIPO, has been followed by the ACICA in 2011 and more recently by the KLRCA in 2012. These rules offer the most detailed fast-track procedures. Interestingly, however, the regular arbitration rules of these institutions do not contain any provision in relation to FTA at all. This may be a downside as it is sometimes difficult to clearly divide arbitral proceedings.⁵⁴⁶

⁵⁴⁵ *Ibid*

⁵⁴⁶ Freyer (1998) p. 104

4.3 Due Process and Fast-track Procedures

FTA Rules are now readily available for parties to international commercial contracts who prefer to use fast-track arbitral proceedings rather than regular arbitral proceedings. But achieving speed and economy is useless unless fast-track procedures respect the fundamental principle of due process rights. Most nations recognise the importance due process and the laws of many require arbitration proceedings to meet with minimum standards of due process before the state will lend its support to the enforcement of an award.

Due process is often explicitly required by the *lex arbitri*. For example, Article 18 of the UNCITRAL Model Law stipulates that the *"parties must be treated with equality and each party must be given a reasonable opportunity of presenting the party's case"*.⁵⁴⁷

The requirement for due process is also given express recognition in the NYC, which states in Article V.1 (b):

*"Recognition and enforcement of the award may be refused... if... the party against whom the award was made was ... unable to present his case."*⁵⁴⁸

The requirement of due process is common across many jurisdictions, whether directly stipulated as a procedural requirement under national arbitration legislation, or as a general requirement of public policy and legal tradition.⁵⁴⁹ In either case, it will generally be mandated by the *lex arbitri*, although specific standards may vary from jurisdiction to jurisdiction.⁵⁵⁰

⁵⁴⁷ UNCITRAL Model Law, Article 18; UNCITRAL Rules, Article 17

⁵⁴⁸ NYC Article V(1)(b)

⁵⁴⁹ Mantilla-Serrano (2004) p. 341

⁵⁵⁰ See *e.g.* Article 33(1) of the English Arbitration Act of 1996 and Article 14(1) of the LCIA Rules (fairness, impartiality and that each party has 'a reasonable opportunity of putting its case and dealing with that of its opponent'); Article 16 of the AAA/ICDR International Arbitration Rules (equality and that each party has "the right to be heard" and "a fair opportunity to present its case").

The authority of parties and the tribunal to conduct fast-track procedures is therefore subject to the right of due process which is commonly also enshrined in the FTA rules.⁵⁵¹ Article 5(1) of the KLRCA Fast-track Rules of 2012 states:

“Subject to these Rules, the Arbitral Tribunal shall have the powers permitted by law and under the Act to ensure the just, expeditious, economical and final determination of the dispute(s) in the reference. In this regard, the Arbitral Tribunal shall conduct the arbitration in such manner as the Arbitral Tribunal considers appropriate, save that at all times the Arbitral Tribunal shall ensure that the parties are treated equally and are given reasonable opportunity to present their case.”

Similarly Article 19(2) of the SCC Rules for Expedited Arbitrations of 2010 states:

*“In all cases, the Arbitrator shall conduct the arbitration in an impartial, practical and expeditious manner, giving each party an equal and reasonable opportunity to present its case.”*⁵⁵²

In some cases the requirements of due process may restrict parties' freedom to determine the speed of their arbitral proceedings or the arbitrators' authority to accelerate the process.⁵⁵³ For example, a provision in an FTA agreement that the arbitral tribunal should hear only one party might well be treated as contrary to public policy under the law of the country of enforcement even if both parties had agreed to it.⁵⁵⁴ In such a case, the arbitrator will refuse the parties' request in order to comply with the requirement of due process.⁵⁵⁵

⁵⁵¹ Magnusson (2001)

⁵⁵² SCC FTA Rules, Article 19(2)

⁵⁵³ Müller (1998) p.6

⁵⁵⁴ *Ibid* p.6

⁵⁵⁵ *Société BKMI et Siemens v. Société Dutco*, Cour de Cassation, 7 January 1992, reported in (1993) XVIII YBCA 140–142.

Similarly, while Article 19 of the UNCITRAL Model Law ensures that the parties are free to agree on procedure, the parties are also bound by Article 18 (due process), which in practice could be regarded as "a limitation" of Article 19. As the UNCITRAL Secretariat in its report leading to the Model Law noted:

*"It will be one of the more delicate and complex problems of the preparation of a Model Law to strike a balance between the interests of the parties to freely determine the procedure to be followed and the interests of the legal system expressed to give recognition and effect thereto."*⁵⁵⁶

From an international FTA perspective, the most essential expression of the principle of due process is the appointment of an impartial and independent arbitrator who treats the parties fairly and equally.⁵⁵⁷

4.3.1 Impartiality and Independence of Arbitrators

Impartiality⁵⁵⁸ and independence⁵⁵⁹ are indispensable elements of FTA. The FTA Arbitrator has to achieve the right balance between making a valid decision in the shortest time practical and compliance with due process.

Whatever procedures the arbitrator conducts,⁵⁶⁰ they may not unduly favour one of the parties over another.⁵⁶¹ This requires him to be free from any bias resulting from a privileged relationship with the matter to be decided. This also prohibits certain relationships, particularly of a financial nature, between the arbitrator and one of the parties or any other participant in the arbitral proceedings.

⁵⁵⁶ Holtzmann (1984)

⁵⁵⁷ Universal Declaration of Human Rights Article 10; ECHR Article 6 (1).

⁵⁵⁸ Poudret/Basson/Berti/Ponti (2007) p.348

⁵⁵⁹ Mustill/Boyd (2001) p.96

⁵⁶⁰ *O'Reilly v Mackman* [1982] 3 All ER 1124 (HL) at 1126j-1127a

⁵⁶¹ Mustill (1989) p. 291

Arbitration awards have been deemed invalid by English courts due to a violation of the principles of due process because the arbitrator did not act impartially or had infringed the right of a party to be heard at all.⁵⁶² Although it is possible for a party to assert that they need more time to make their case and that their being compelled to strictly comply with FTA provisions casts doubt on the arbitrator's independence, the courts are often supportive to arbitrators unless there is a real danger of bias.⁵⁶³ For instance, English courts tend to uphold the decision of the arbitrator and accept certain breaches of the rules of due process⁵⁶⁴ as a necessary evil resulting from the parties' intention to receive a quick decision and arbitrator's duty to achieve that aim.⁵⁶⁵

Courts have on many occasions rejected claims of partiality related to FTA and decided that the danger of bias did not exist under expedited procedures.⁵⁶⁶ Thus, an arbitrator's decision to impose procedural limitations or refuse to extend shorter time limits is not in itself sufficient to support the conclusion that an arbitrator is biased.⁵⁶⁷

⁵⁶² Hanotiau/Caprassé (2010); Herrmann (2001) p.71-79

⁵⁶³ *R. v. Gough*, [1993] A.C. 646 Lord Goff of Chieveley

⁵⁶⁴ Lembcke (2007) p.96

⁵⁶⁵ Jenkins/Stebbing (2006) p.108

⁵⁶⁶ A.v.B.[2011] EWHC 2345 (Comm); Argonaut Insurance Co v Republic Insurance Co [2003] EWHC 547 (Comm); Rustal Trading Ltd v Gill & Duffus SA [2000] 1 Lloyd's Rep. 14 applied. See also Morison J in ASM Shipping Ltd of India v TTMI Ltd of England [2005] EWHC 2238 (Comm); [2006] 2 All ER (Comm) 122 p. 39 (2)

⁵⁶⁷ *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416 at 1 to 3 of his speech

4.3.2 Right to be heard

In international arbitration the right to be heard is expressed as *‘the right of each party to a reasonable opportunity to present its case.’*⁵⁶⁸ This includes the right to know the allegations made and proof provided by the other party, and to have a real opportunity to respond.⁵⁶⁹ The judgement delivered by Lord Denning in this regard in the case of *Kanda v. Government of Malaya* states that:

*“If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him: and then he must be given a fair opportunity to correct or contradict them.”*⁵⁷⁰

Similarly US Court decisions have pointed out that the right to be heard implies *“the opportunity to be heard at a meaningful time and in a meaningful manner.”*⁵⁷¹

The right to be heard encompasses the following requirements: a) to receive proper notice—whether it be of the initiation of the proceeding, of the appointment process for the arbitral tribunal or of the pleadings, allegations, and evidence;⁵⁷² b) to be given a reasonable time and opportunity to respond,

⁵⁶⁸ UNCITRAL Model Law, Article 18, (‘a full opportunity of presenting his case’); English Arbitration Act of 1996, Section 33(1); LCIA Rules, Article 14(1) (‘a reasonable opportunity of putting its case and dealing with that of its opponent’); UNCITRAL Rules, Article 17(1) and ICC Rules, Article 22(4) (‘a reasonable opportunity to present its case’).

⁵⁶⁹ Gaillard/Savage (1999) pp. 946-952 Sections 1638-1649 (Breach of Due Process)

⁵⁷⁰ *Kanda v. Government of Federation of Malaya* [1962] AC 322 (Privy Council) p.337; See also *Hannaco Ltd. v. Lee*, [1997] A.J. No. 81 (30 January 1997) para. 18.

⁵⁷¹ *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, 1129–30 (7th Cir. 1997); (1998) XXIII YBCA 1076; *Slaney v. Int’l Amateur Athletic Federation*, 244 F.3d 580 (7th Cir. 2000); (2001) XXVI YBCA 1091; *Ukrvneshprom State Foreign Economic Enterprise v. Tradeway, Inc.*, No. 95 Civ. 10278 (RPP) (S.D.N.Y. Mar. 11, 1996); [1996] WL 107285; (1997) XXII YBCA 958

⁵⁷² *Seabridge Shipping AB v AC Orsleff’s Eff’s A/S* [2000] 1 All ER (Comm) 415; *Atlanska Plovidba v Consignaciones Asturianas SA (The Lapad)* [2004] EWHC 1273 (Admty), [2004] 2 Lloyd’s Rep. 109; *Bulk & Metal Transport (UK) LLP v Voc Bulk Ultra Handymax Pool LLC (The Voc Gallant)* [2009] EWHC 288 (Comm), [2009] 2 All E.R. (Comm) 377; and *Finmoon Ltd v Baltic Reefers* [2012] EWHC 920 (Comm).

respecting the right to an adversarial proceeding;⁵⁷³ and c) in general, not to be unreasonably deprived of an opportunity to present the case.⁵⁷⁴

Nevertheless, in most FTA proceedings previous court decisions have shown that it is reasonable to refuse multiple days of hearings, numerous witnesses, or lengthy arguments in the interest of saving time and cost. Furthermore, modern FTA rules commonly provide for the accelerated written exchange of allegations and proof without a substantial hearing, so that the substantive content of the right to be heard might be satisfied before the hearing is reached, particularly where there was little or no factual dispute between the witnesses presented by the parties.⁵⁷⁵ If the right to be heard does not necessarily require an oral hearing, it follows that nor is any particular element of an oral hearing ipso facto indispensable to the right to be heard. Accordingly, the right to be heard does not necessarily mean that a party has the right to present all its evidence or arguments at a hearing, or to demand direct examination of its own witnesses or cross-examination of opposing witnesses at the hearing.⁵⁷⁶

Similarly, observing the right to be heard does not mean that arbitrators are obliged to grant every single party's request related to the establishment of the facts of the case.⁵⁷⁷

"The arbitral tribunal will only be obliged to accept the belated submission of documents or evidence where the party submitting them has a valid excuse

⁵⁷³ Broda Agro Trade (Cyprus) Ltd v Alfred C Toepfer International GmbH [2009] EWHC 3318 (Comm); L Brown & Sons Ltd v Crosby Homes (North West) Ltd [2008] EWHC 817 (TCC); Kalmneft JSC v Glencore International AG [2002] 1 All ER 76

⁵⁷⁴ *Apis AS v Fantazia Kereskedelmi KFT (No. 1)* [2001] 1 All E.R. (Comm) 348; *Irvani v Irvani* [2000] 1 Lloyd's Rep. 412; *Aquator Shipping Ltd v Kleimar NV (The Capricorn 1)*, [1998] 2 Lloyd's Rep. 379

⁵⁷⁵ *Margulead Ltd. v Exide Technologies* [2005] 1 Lloyd's Rep 324; [2004] EWHC 1019 (Comm); *Blackaby/Partasides/Redfern/Hunter* (2009) ¶6-231

⁵⁷⁶ *British Insurance Co. of Cayman v. Water Street Insurance Co. Ltd.*, 93 F.Supp.2d 506, (Dist. Cir. 2000); *Griffin Industries, Inc. and Ocean Logistics Corporation v. Petrojam, Ltd*, 58 F. Supp. 2d 212, Dist. Cir 1999); *InterCarbon Bermuda, Ltd., v. Caltex Trading and Transport Corporation*, 146 F.R.D. 64, (Dist. Cir.1993); Audiencia Provincial de Madrid, Sección 10ª, Sentencia de 6 de julio de 2002, rec. 316/2001;

⁵⁷⁷ Hanotiau/Caprassé (2004)

*for its delay. In the absence of a legitimate reason, the tribunal can take a firm position and simply reject the memorials or evidence submitted late... The requirements of due process are in fact satisfied if the initial deadline was sufficient to enable the party in question to present its arguments and evidence.*⁵⁷⁸

In the US, the courts have stated that although the arbitration hearing must be fair and comply with the basic notions of due process, the parties should not expect the same procedures as they would find in a court.⁵⁷⁹ For example in *Generica Ltd. v. Pharmaceutical Basics, Inc.*⁵⁸⁰ the US Court of Appeals for the Seventh Circuit found that where the terms of reference had given the arbitrator discretion to determine what evidence to admit, a refusal to allow a cross-examination on a point which the tribunal considered to be irrelevant, was not an infringement of due process.⁵⁸¹

The same principle would apply in a time limited or single hearing: where a tribunal has set a sufficient period of time for a party to, for example, question witnesses, the tribunal is not obliged to give extra time where counsel for that party has failed to comply with the prescribed time-limit. The right to be heard can be satisfied even if there are procedural limitations.⁵⁸² Further, if the tribunal believes the questioning or submissions of counsel are irrelevant and repetitive it can direct counsel to continue in another manner or move to a relevant topic in order to reduce cost and delay.⁵⁸³

⁵⁷⁸ Gaillard/Savage (1999) p. 694 Section 1270

⁵⁷⁹ *Generica Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123, (7th Cir. 1997);

⁵⁸⁰ *Ibid* 125 F3d 1123 1129-1130

⁵⁸¹ *Ibid* 125 F3d 1123 pp.1120-1130

⁵⁸² Hanseatisches Oberlandesgericht Hamburg, 27 July 1978 in (1979) IV YBCA 266 - 268

⁵⁸³ See Article 8(1) of the IBA Rules on the Taking of Evidence in International Commercial Arbitration; Turner/Mohtashami (2009); Mohtashami (1999) p.129-130

4.3.3 Equal Treatment

Equality requires that there must be a just balance between the parties, so that each has a reasonable opportunity of presenting its case in circumstances that do not place it at a clear disadvantage in relation to the other party.⁵⁸⁴ It is therefore, intimately related to the right to be heard.⁵⁸⁵

To ensure equal treatment, parties' pleadings should be made available to their opponents early enough to give them the opportunity to respond; any orders of the arbitrator regarding future procedures or the extension of deadlines in favour of one party should also be communicated without delay; and the parties should have an equal opportunity to comment on proffered evidence.⁵⁸⁶ Furthermore, where applicable, sufficient time should be allowed to prepare the translation of any document produced in a foreign language. Of course, the determination of what constitutes "sufficient time" in a fast track arbitration must reflect the parties' choice of an accelerated dispute resolution mechanism. Thus, the time frame granted in fast track arbitration may be considerably shorter than in regular arbitration.⁵⁸⁷

Because parties are not identical and nor are their circumstances, the right to equality requires substantially equal opportunities for each to make its case, rather than a formal or mechanistic equality in all procedural matters. Certainly, equality would be infringed if, for example, a party was not permitted to call its only witness to the existence of an oral contract when a witness has testified for the other party on this issue. But equality would not be denied where a witness is not heard under identical conditions as the witness for the other party,⁵⁸⁸ or when one party is permitted to file an

⁵⁸⁴ *Dombo Beheer BV v. The Netherlands*, ECHR 27 October 1993

⁵⁸⁵ Caron/Pellonpää/Caplan (2006) p. 29

⁵⁸⁶ Trappe (1998) p.99

⁵⁸⁷ Müller (1998) p.7

⁵⁸⁸ *Compare Ankerl v. Switzerland* ECHR, (23 October 1996), and *Dombo Beheer B.V. v. The Netherlands*, ECHR (27 October 1993).

extensive Memorial with additional exhibits but the other party is not permitted to reply that extensively.⁵⁸⁹

Thus, many national laws provide *ex parte* proceedings where if one party does not take part in the proceedings the case must be heard with the other party alone. While these provisions do not allow a decision to be made by default, an arbitrator is entitled to proceed with the arbitration with one party alone if the other side, despite having been given notice of the proceedings and the hearing, chooses not to exercise its right to present its case.⁵⁹⁰

Similarly, equal treatment of the parties is not violated if a witness does not appear before a tribunal after having been summoned even if arbitral tribunal does not procure the appearance of the witness through the state courts *ex officio*. The arbitral tribunal will also be typically entitled to limit the scope of the evidence taken, for example hearing only four of ten witnesses offered by a party, without violating the equal treatment of the parties.

The discretion of the arbitral tribunal is key in achieving equality. In *Walkinshaw v Diniz*⁵⁹¹, arbitral rules required a single hearing and a 3 months time limit for the issuance of final award but the respondent continuously contested the jurisdiction of the arbitral tribunal and sabotaged the arbitral proceedings. Notwithstanding the Rules and the dilatory tactics of the Respondent, the tribunal made a partial award within the 3 months deadline in which it decided that, as a matter of fairness, they would adjourn the matter to allow the Respondent to attend and make submissions as to whether they had jurisdiction to decide the issue, and they gave further direction for the hearing at that point:

⁵⁸⁹ Caron/Pellonpää/Caplan (2006) p. 28.

⁵⁹⁰ Hierro (2012) p.37

⁵⁹¹ *Walkinshaw v Diniz* (Stay of Proceedings). (1999, May 19). Queen's bench division (commercial court). [1999] WL 33105608; [2000] 2 All E.R. (Comm) 237

“As a matter of fairness to TWR/Arrows [Respondent in Arbitration], given the sum of money apparently turning indirectly on the answer to this issue [a reference to whether the contract had been terminated under clause 9.2(b) or clause 9.5] we think it is wrong to proceed in TWR/Arrows' absence without giving it another opportunity to attend a further CRB meeting [arbitration hearing] where it could present evidence and argument in support of its case, provided that no irreparable prejudice from such a delay is thereby inflicted upon the Driver or Sauber [Claimants in Arbitration].”⁵⁹²

These examples support Rowley’s view that a properly operating FTA tribunal can make concerns about due process melt away.⁵⁹³

4.4 Establishing a Fast-track Arbitration

A number of factors have caused FTA to be frequently preferred over regular arbitration in the resolution of international commercial disputes.⁵⁹⁴ But FTA can have its pitfalls too, and parties should be aware of them, both when negotiating their contracts and deciding how to proceed when a dispute occurs.⁵⁹⁵ This section describes the principal matters that should be considered by parties in selecting appropriate FTA methods and in drafting the FTA clause. Selecting between different FTA alternatives available will then be considered.⁵⁹⁶

There are three types of FTA agreements: The Pre-dispute FTA Clause, which is drafted to anticipate future disputes; The Post-dispute Submission Agreement, which deals with an existing dispute but before arbitration commences; and The Post-tribunal Supplementary Agreement which deals with the acceleration of an existing arbitration. In all cases, it is the parties’ agreement that is the dominant factor in creating fast-track procedures.

⁵⁹² *Ibid*

⁵⁹³ Rowley/ Levy/Baker (2009)

⁵⁹⁴ Newman (1994) p. 165; Rovine (1992) pp.45-57.

⁵⁹⁵ Franck (2006) p. 499

⁵⁹⁶ Arias (2010)

4.4.1 Pre-dispute FTA clauses and Fast-track Methods

Pre-dispute clauses present the most realistic opportunity for implementing fast-track procedures as once a dispute has arisen the parties are unlikely to agree on anything – FTA included. At that stage, one party's desire for fast-track proceedings is typically thwarted by its opponent's interest in making proceedings as slow as possible.

There are four common methods used to achieve FTA in the pre-dispute arbitration clause. The first imposes one overall time limit for the entire proceedings, i.e. from the commencement of arbitration to the issuance of the award.⁵⁹⁷ The second imposes various time limits for the abbreviated arbitration phases.⁵⁹⁸ The third introduces procedural shortcuts in addition to specific time limits and deadlines.⁵⁹⁹ The last common method is the segmentation of disputes so that parties apply fast-track procedures only to specific defined areas of dispute and apply regular arbitration procedures to the rest.

4.4.1.1 Overall Time Limits

An overall time limit is a method for fast-tracking the procedure in which parties agree that the arbitral award shall be rendered within a specified time period starting from a given event, such as from the date the request for arbitration is received by the institution or by the respondent; or the appointment or confirmation of the arbitrators; or the date the file is transmitted to the tribunal.

⁵⁹⁷ Davis (1992) pp. 43-45

⁵⁹⁸ Coe (2002) p.61

⁵⁹⁹ Newman (1994) p. 165; Rovine (1992) pp.45-57

Although parties are free to set any overall time limit, care should be taken that enough time is allowed for all the proceedings to be carried out.⁶⁰⁰ Also, when determining the overall time for rendering the award in the FTA clause, special attention must be paid to the clarification of the beginning and of the end of the award term, and whether it can be interrupted by certain procedural events⁶⁰¹ as such lack of clarity has sometimes generated issues.⁶⁰² For example, the time limit should not be triggered simply by notice of an issue leading to a dispute, but rather, by a request for arbitration in relation to that issue. Bermann⁶⁰³ and Freyer⁶⁰⁴ suggests that the overall time limit should run after the preliminary stages of the arbitration have been completed, (e.g., after the appointment of arbitrators or after the expiration of time-limits for challenges to arbitrators and after the payment of security deposits) and not from the date of the initiation of the arbitration with the notice of arbitration. Freyer observes that an FTA clause's requirement that the award be rendered in an ICC arbitration within a certain time period from the date of the "notice" of arbitration seems pathological given that the ICC Rules refer to the request for – and not notice of – arbitration.⁶⁰⁵

The duration of an overall time limit will normally be extendable rather than fixed. However, some parties utilize non-extendable time limits such as 60 days for the conduct of the entire fast-track procedure, as occurred in the first FTA cases of 1991.

In order to determine what is a reasonable non-extendable time limit for arbitration the drafters of the FTA clause need to possess the skill and imagination to adapt the fast-track rules to the specifics of their business and

⁶⁰⁰ UNCITRAL Model Law Article 24(2); German Arbitration Law of 1998, Article 1047(2); Jordanian Arbitration Law No 31 of 2001, Article 32(2); Syrian Arbitration Law No. 4 of 2008, Article 23(2); Chilean Law No. 19.971 on International Commercial Arbitration, Article 24(2)

⁶⁰¹ Grandjean (1995) p. 47

⁶⁰² Davis/Lagace/Volkovitch (1993) p. 81

⁶⁰³ Bermann (1994) p. 212

⁶⁰⁴ Freyer (1998) p.107

⁶⁰⁵ *Ibid* p.107

to ensure that the absolute time limit will adequately accommodate all after-dispute situations.⁶⁰⁶

There will always be uncertainties, such as who will be claimant or respondent, what will be the size and complexity of the claim, the number of witnesses and their locations, or whether there will be a need for expert witness or document production. For this reason, general FTA clause with a fixed, absolute time limit can be pathological and very dangerous.⁶⁰⁷ Without knowing what kind of disputes may arise, an inflexible time limit may turn out to be completely unrealistic.⁶⁰⁸

In *Petro-Canada v. Alberta Gas Ethylene Co.*⁶⁰⁹, a Canadian case, an arbitration agreement provided for delivery of the tribunal's decision within thirty days after the hearing and for either party to have a new tribunal chosen if the award was not communicated within sixty days after the hearing. When the award was delivered outside both time limits (sixty days after the hearing), the applicant elected to have a new tribunal appointed. It was held that the mandate of the arbitral tribunal was terminated and the court enjoined the arbitral tribunal from issuing the award. The Court of Appeal affirmed the decision of the court of Queen's Bench. The court agreed with the principles enunciated in the following excerpt from Redfern and Hunter:⁶¹⁰

“A limit may be imposed as to the time within which the arbitral tribunal must make its award. When this limit is reached the authority or mandate of the arbitral tribunal is at an end and it no longer has jurisdiction to make a valid award. This means that where a time limit exists, care must be taken to see either (a) that the time limit is observed or (b) that the time limit is extended

⁶⁰⁶ Conference: The arbitration agreement, its multifold critical aspects : A collection of reports and materials delivered at the ASA conference held in Basel on 17 June 1994. In Zürich: ASO p. 32

⁶⁰⁷ Davis/Lagace/Volkovitch (1993) p.78

⁶⁰⁸ Derains/Schwartz (2005) p.375

⁶⁰⁹ *Petro-Canada et al v. Alberta Gas Ethylene Co. Ltd. et al* 127 A.R. and 20 W.A.C. 128, 121 A.R. 1992 at p. 212-213, (Alberta Court of Queens Bench, 12 July 1991) aff'd, 127 A.R. 128 (Alberta Court of Appeal, 28 January 1992); Harradence/Stratton/Fraser

⁶¹⁰ Redfern/Hunter (1986) pp.295-296

*before it expires. The purpose of time limits is to ensure that the case is dealt with speedily; such limits may be imposed on the arbitral tribunal by the rules of an arbitral institution, by the relevant law, or by the agreement of the parties.*⁶¹¹

To avoid the spectre of lost jurisdiction, the arbitration system selected should include a provision to extend overall time limits if it becomes necessary to do so. The following clause sets a non-absolute overall time limit on the duration of arbitration:

*“The award shall be rendered in [...] months of the commencement of arbitration, unless the arbitral tribunal determines that the interest of justice requires that such limit be extended”*⁶¹²

Where the parties set their own time limits in the FTA clause a clear starting point which is not open to argument should be chosen, e.g. the nomination of the arbitrator, the acceptance of the nomination by the arbitrator, or the time of the delivery of the request for arbitration to the respondent, or the signing of the terms of reference.⁶¹³ An example of a pre-dispute FTA with a clear starting point and non-absolute time limits can be found in the 2010 IBA *Guidelines for Drafting International Arbitration Clauses* which adopts a very cautious approach to setting time limits:

*“The award shall be rendered within [...] months of the appointment of [the sole arbitrator] [the chairperson], unless the arbitral tribunal determines, in a reasoned decision, that the interest of justice or the complexity of the case requires that such limit be extended.”*⁶¹⁴

⁶¹¹ *Petro-Canada et al v. Alberta Gas Ethylene Co. Ltd. et al* 127 A.R. 128 (Alberta Court of Appeal, 28 January 1992)

⁶¹² Born (2010) pp. 37-116

⁶¹³ McIlwraith/Savage (2010) p.274

⁶¹⁴ IBA Guidelines for Drafting International Arbitration Clauses of 2010, para. 80

Even if there is provision for extending time limits, creating unreasonably short deadlines for action by arbitrators is pathological. Particularly, if such a deadline means that the mandate of the arbitral tribunal expires before it can complete the arbitration.⁶¹⁵ In one case, a time period of three months was specified for the arbitrators to issue an award, with a provision that this period could be extended four times. However one party refused to extend the period, and the arbitrators ruled that their mandate had expired.⁶¹⁶

For this reason the arbitration clause should also include a security for its enforceability in addition to clear start and end dates, and a provision for extending time limits. Thus, if the parties agree to give the arbitrators more power to manage time limits, the FTA clause can be:

“The Parties mutually desire and intend that, barring exceptional and unforeseen circumstances, any arbitration under this Article [...] shall be made [...] days from the appointment of the [sole arbitrator] [presiding arbitrator]. The Parties may extend this time limit by written agreement. The arbitral tribunal may extend this time limit in its discretion if it considers that the interest of justice so requires. The arbitral tribunal shall use its best efforts to issue the final award within such time period. The arbitral tribunal's failure to make a final award within this time limit shall not be a basis for refusing to comply with or for challenging or resisting enforcement of any such award.”⁶¹⁷

Additionally, the mandate of the arbitral tribunal is usually required not to end automatically after the expiration of time limits unless the arbitral institution or the local courts at the place of arbitration compel it to expire.⁶¹⁸

⁶¹⁵ Craig/Park/Paulsson (1990) § 9.01 at 158. (Defective arbitration clauses were first denominated as "pathological" in 1974 by Frederick Eisemann, who served at that time as the Secretary General of the ICC International Court of Arbitration.)

⁶¹⁶ *Belgian Enterprise v. Iranian Factory*, (1983) VII YBCA 119, 120-21, 124

⁶¹⁷ Born (2010) p. 95

⁶¹⁸ Zuberbühler/Müller/Habegger (2005) pp.351-362

This will prevent attempts to sabotage fast-track procedures by making time limits expire. In one case the court decided that the arbitrator did not exceed its powers by where the award was made two weeks after the deadline expired the respondent requested numerous time extensions to delays and extensions throughout proceedings, and the tribunal rendered its decision within six weeks of conclusion of lengthy post-hearing briefing period.⁶¹⁹

Instead of the parties drawing up their own FTA clause, it may be chosen by reference to institutional FTA rules.⁶²⁰ Once the appropriate institutional FTA Rules are stipulated, the said institution may expressly prohibit the arbitrator from extending the time-limit of arbitration in the absence of agreement of all the parties. However, in such an instance the supervising arbitration institution should be empowered to extend the time if the arbitrator fails to render an award within the time prescribed. In this manner, the arbitrator will be encouraged to observe the stipulated time limit in which to make his award but, in the event he fails to do so, with the approval of the supervisory institution, the arbitration can continue.⁶²¹

4.4.1.1 Institutional Time Limits

Arbitral institutions provide clear rules in relation to the beginning, ending and duration of time-limits. The ICC, for instance, recommends the term to start from the moment the Term of Reference is signed by the arbitral tribunal.⁶²² The KLRCA FTA Rules deem both the arbitration and the time limit to commence when the party initiating the arbitration delivers to the other party a notice in writing stating its intention to commence arbitration.⁶²³

⁶¹⁹ Electronic Data Systems Corp. v. Donelson 473 F.3d 684 C.A.6 (Mich.) (2007)

⁶²⁰ Bond/Paralika/Secomb (2010) p. 386

⁶²¹ ICC Rules (1998), Article 24(1); ICC Rules, Article 30 See Derains/Schwartz (2005) p. 305, (This time limit is routinely extended).

⁶²² ICC Rules, Article 30 (The six-month time limit commences on the date of the last signature of the arbitral tribunal or the Terms of Reference (if they are signed by all parties and arbitrators) or on the date of notification to the arbitral tribunal that the Terms of Reference have been approved by the ICC Court pursuant to Article 23(3))

⁶²³ KLRCA FTA Rules, Article 3

Under the AAA Commercial Rules the arbitrator is required to schedule the date, time, and place of the hearing, so that it takes place within 30 days of confirmation of the arbitrator's appointment.⁶²⁴ Hearings shall not exceed 1 day.⁶²⁵ An award must be made within 14 days of the oral hearing or submission of final documents.⁶²⁶ Thus, the expedited procedures envisions the possibility of an award being made as soon as 50 days after the submission of the request for arbitration or, if the AAA loses no time in responding to the request and setting up the arbitral tribunal, even sooner. However, the procedures do not specify an overall time limit.⁶²⁷

As long as no extensions are permitted, WIPO FTA Rules can result in an arbitration which completes within as few as 53 days, or more quickly if the parties agree to shorter time limits for the submission of an answer or for the expert report. In any case, Article 56 dictates that the arbitration must be closed within 3 months after either the delivery of the Statement of Defence or the establishment of the Tribunal, whichever event occurs later. The final award should, be made within one month thereafter.⁶²⁸

The International Institute for Conflict Prevention & Resolution (CPR) approaches FTA slightly differently. Most of its time limits contained under its rules are discretionary, it also sets maximum allowable period for the whole arbitration. Under CPR Global Rules for Accelerated Commercial Arbitration an award must be made "*in as short a period as possible*" but no later than six months from the selection of the tribunal.⁶²⁹

The stand-alone FTA Rules of SCC and FCC aim to complete an arbitration within three months of the date that the claim was transmitted to the

⁶²⁴ AAA Rules, Article E7

⁶²⁵ AAA Rules, Article E8

⁶²⁶ AAA Rules, Article E9

⁶²⁷ *Ibid*

⁶²⁸ WIPO FTA Rules, Article 56(a)

⁶²⁹ CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 1.5.2

arbitrator.⁶³⁰ Under the ACICA FTA Rules, the final award should be made within 4 months of the appointment of the Arbitrator but if there is a counterclaim then within 5 months.⁶³¹

The DIS in its Supplementary Rules for Expedited Proceedings (SREP) deviate from the widely used principle that time limits only begin to run after the establishment of the arbitral tribunal. Section 1(2) of the DIS SREP Rules provides that the duration of arbitral proceedings should be no longer than six months (in the case of a sole arbitrator) or nine months (in the case of a three-member tribunal) *after the filing of the statement of claim*.⁶³²

The KLRCA also stipulates a time limit of 90 days from the commencement of arbitration in a documents only arbitration. Notably, arbitration commence with the notice of the request for arbitration rather than with the establishment of arbitral tribunal. With regard to arbitration with a substantive oral hearing, the Arbitral Tribunal shall publish the final award expeditiously and no later than 160 days from the commencement of the arbitration.⁶³³

The CIETAC Summary Procedures stipulate a three-month period for rendering the award. This period commences when the case has been submitted to the arbitrator.⁶³⁴ If it becomes difficult or perhaps impossible for the arbitrator to comply with this time limit, the Secretary General of CIETAC may, at the request of the arbitrator, extend the period.⁶³⁵ The HKIAC and the SIAC Expedited Procedures also provide a time limit for the rendering of an award but their expedited time limit equals the standard procedures of CIETAC, which is six months from the formation of arbitral tribunal.⁶³⁶ The Japan Commercial Arbitration Association (JCAA) also links the time for

⁶³⁰ SCC FTA Rules, Article 36; FCC FTA Rules, Article 33

⁶³¹ ACICA FTA Rules, Article 27

⁶³² DIS SREP, Article 1(2)

⁶³³ KLRCA FTA Rules, Articles 12(4) and 12(5)

⁶³⁴ CIETAC Rules, Articles 60

⁶³⁵ CIETAC Rules, Article 46

⁶³⁶ SIAC Rules, Articles 5(2)(d); HKIAC Rules, Article 38(d)

rendering the award to the establishment of the arbitral tribunal and requires the award to be rendered within three months thereof.⁶³⁷

Additionally, despite not being separate fast-track procedures, the regular arbitration rules of the WIPO, the LCIA and the SIAC set multi-stage procedural deadlines.⁶³⁸ ICC and LCIA rules, in contrast, provide only for discretionary shortening of time limits, as is always available to parties in regular arbitration. Neither institution specifies a limit on the total time an expedited arbitration should last, although the time limit for an ordinary ICC arbitration is six months from the formation of the arbitral tribunal.⁶³⁹

4.4.1.1.2 Authority to Modify Time Limits under institutional FTA Rules

Additionally almost all FTA Rules authorize parties institutions or the tribunal to shorten the time limits they prescribe.⁶⁴⁰

For example, under Articles 4(f) and 4(g) of WIPO FTA Rules, it is possible to shorten the 20-day time limit for the Answer,⁶⁴¹ the 15-day time limit for the constitution of the Tribunal,⁶⁴² the 20-day time limits for the Statements of Claim and Defence,⁶⁴³ and the 30-day time limit for holding a hearing after the end of written submissions.⁶⁴⁴

Rather than itemise which rules are subject to modification by the parties, some FTA Rules give the parties general authority to modify all time periods

⁶³⁷ JCAA Rules, Article 65

⁶³⁸ WIPO Rules, Articles 11, 15(b), 16(b), 17(b), 17(c), 18(b), 19(b)(iii), 41(a), 42(a) 67(d), 68(e) and 70(e); LCIA Rules, Article 15 (sets out the procedural timetable for the submission of Written Statements (pleadings) and key documentary evidence.) SIAC Rules, Article 17

⁶³⁹ IBA Guidelines for Drafting International Arbitration Clauses of 2010 para. 31

⁶⁴⁰ KLRCA FTA Rules, Article 1(2); SCC FTA Rules, Article 7; WIPO FTA Rules, Article 4(g) and (4(f)

⁶⁴¹ WIPO FTA Rules, Article 11

⁶⁴² WIPO FTA Rules, Article 14(b)

⁶⁴³ WIPO FTA Rules, Article 37(a)

⁶⁴⁴ WIPO FTA Rules, Article 47(b)

referenced by the Rules.⁶⁴⁵ Under Some Institutional Rules the institution may even shorten or extend any time limits.⁶⁴⁶ Thus, Article 1.2 of KLRCA FTA Rules clearly incorporates the KLRCA Board's authority to modify time periods within the Rules before the commencement of arbitration. In a similar vein, Article 9 of the LCIA Rules allows the LCIA Court, where necessary, to shorten radically the time normally taken to appoint the arbitral tribunal. A similar approach is taken by many opt-out FTA Rules like those of the SCAI, the SIAC and the HKIAC.⁶⁴⁷

By contrast, Article 4 (g) of the WIPO Rules, only authorizes the Centre to *extend*, but not to reduce, the periods for the Answer and the constitution of the Tribunal, the deadlines for the Statements of Claim and Defence, and the time-limit for holding the Hearing after the establishment of the Arbitral Tribunal. A potential problem with the WIPO's approach is that the parties and/or the institutions may be deemed not to have the authority to modify any of the time limits not listed in WIPO FTA Rules. In appropriate circumstances, it would seem preferable that the parties or the institution could extend or reduce the 7 day time limit for the challenge of an arbitrator,⁶⁴⁸ the 3 month time limit for the closure of hearings after the statement of claim and defence and the 1 month time limit for the issuance of the final award after the hearing,⁶⁴⁹ and the 30 day time limit for the correction of the award.⁶⁵⁰

Article 7 of the SCC FTA Rules authorizes the Board, on application by either party or on its own volition, to extend any time period which has been set for a party to comply with a particular direction.⁶⁵¹ The list is not inclusive and does not preclude the parties and the Board's authority from extending the time

⁶⁴⁵ ACICA FTA Rules, Article 2(1); KLRCA FTA Rules, Article 12 (5);

⁶⁴⁶ SIAC Rules, Article 5(2)(a); KLRCA FTA Rules, Article 1(2); LCIA Rules Article 4(5) and 4(7); HKIAC Rules, Art 38(2)(a)

⁶⁴⁷ SCAI Rules, Article 2(3); SIAC Rules, Article 5(2); HKIAC Rules, Article 38(2)(a)

⁶⁴⁸ WIPO FTA Rules, Articles 20 and 21

⁶⁴⁹ WIPO FTA Rules, Article 56(a)

⁶⁵⁰ WIPO FTA Rules, Article 59(a)

⁶⁵¹ SCC FTA Rules, Article 7

periods prescribed for challenges to arbitrators,⁶⁵² hearings,⁶⁵³ expert reports,⁶⁵⁴ the closure of the proceedings or the final award⁶⁵⁵ or the correction of the award.⁶⁵⁶ But the problem of the SCC Rules, like the WIPO rules, is that the institutions are not authorized to shorten those time periods where appropriate but can only extend.⁶⁵⁷

Some Arbitration Institutions do have the authority to extend the time periods for the Answer, the parties' joint nomination of the sole arbitrator, the parties' payment of administrative fees,⁶⁵⁸ and the parties' payment of deposits.⁶⁵⁹ Additionally, they are able to reduce the time periods prescribed in their Rules like the LCIA and KLRCA. This authority is appropriate prior to the constitution of the Tribunal. Once the Tribunal has been established, which may occur prior to prescribing a deadline for the Answer, the institution should at least consult, and probably defer to, the Tribunal before reducing or extending the deadline for the procedural conduct of the FTA. Thus, SCC FTA Rules Article 18 sets an example by stating that *"When the Arbitrator has been appointed and the Advance on Costs has been paid, the Secretariat shall refer the case to the Arbitrator."*⁶⁶⁰

Many FTA Rules, like those drafted by the WIPO, the SCC and the KLRCA and the FCC do not specifically deal with the Tribunal's authority to reduce or extend time limits. In fact, the only authority expressly granted to the Tribunal to modify any of the prescribed time periods is found in the general power of tribunals which authorizes them to extend, but not to reduce, periods of time

⁶⁵² WIPO FTA Rules, Articles 25 and 26

⁶⁵³ WIPO FTA Rules, Article 53

⁶⁵⁴ WIPO FTA Rules, Article 55

⁶⁵⁵ WIPO FTA Rules, Article 63

⁶⁵⁶ WIPO FTA Rules, Article 66

⁶⁵⁷ SCC FTA Rules, Article 7 (The board may extent but not shorten the time limits) Similarly, ICC Rules, Article 5(2)

⁶⁵⁸ WIPO FTA RulesArts. 67(d) and 68(e)

⁶⁵⁹ WIPO FTA RulesArts. 70(e)

⁶⁶⁰ SCC FTA Rules, Article 18

fixed by the Rules, and only "*in exceptional cases*",⁶⁶¹ "*when exceptional circumstances exist*"⁶⁶² or "*for special reasons*".⁶⁶³

The Tribunal's general power to extend time limits is, of course, important to allow it to ensure the parties are afforded an adequate opportunity to be heard.⁶⁶⁴ It may also be appropriate to authorize the Tribunal to shorten certain time limits, such as the deadlines for the Statements of Claim and Defence, whenever necessary to expedite the proceedings.

With regard to this, Article 4.7 of the LCIA Rules expressly authorises the tribunal, once constituted, to abridge other time limits specified in the Rules.⁶⁶⁵ The Tribunal may reduce the time periods fixed for the Answer,⁶⁶⁶ challenges of arbitrators,⁶⁶⁷ and expert reports.⁶⁶⁸ The power given by Article 4.7, among other things, extending time limits for the service of a communication by one party on another party. This may be done retrospectively, after the time period has expired. Taken together with Article 22(1) (b), this power can also arguably be used by the Tribunal to extend the time limits for the correction of an award set out in Article 27. In short, the Tribunal under the LCIA is afforded the flexibility to tailor each time limit as speed and justice require.⁶⁶⁹ Similarly the UNCITRAL Rules authorize the arbitral tribunal, at any time once it has invited the parties to express their views, to extend or to abridge any period of time prescribed.⁶⁷⁰

⁶⁶¹ KLRCA FTA Rules, Articles 6(5) and 13; ACICA FTA Rules, Article 13(1); SCC FTA Rules Articles, 19(1) and 19(2) See also AAA/ICDR International Arbitration Rules of 2009, Art 18(1); LCIA Rules, Articles 4(5) and 4(7) WIPO FTA Rules, Article 38(c); ACICA FTA Rules, Article 22(2)

⁶⁶² ACICA FTA Rules, Article 22(2)

⁶⁶³ SCC FTA Rules, Article 19(3); FCC FTA Rules, Article 16(3)

⁶⁶⁴ SCC FTA Rules, Article 36; KLRCA FTA Rules, Article 13; FCC FTA Rules, Article 33(2)

⁶⁶⁵ LCIA Rules, Article 4(7)

⁶⁶⁶ WIPO FTA Rules, Article 11

⁶⁶⁷ WIPO FTA Rules, Articles 25 and 26

⁶⁶⁸ WIPO FTA Rules, Article 55 Participants in the ICC FTA Cases No 7385 and 7402 recommended granting this power to shorten time limits to the Tribunal. See Smit (1991) p. 141; Ballem (1991) p. 153

⁶⁶⁹ LCIA Rules, Articles 4(5) and 4(7); ACICA FTA Rules, Article 22 (2);

⁶⁷⁰ UNCITRAL Rules, Article 17(2)

4.4.1.2 Multi-stage Time Limits

Rather than setting one overall time limit, the second fast-track method uses the pre-dispute FTA clause to set time limits for specified phases of the arbitration.⁶⁷¹ Limits might be applied to the time taken to appoint the arbitrators; or the time allowed to draft the award; or the time between the close of the hearing and the rendering of the award; or that the statement of claim and the statement of defence should be made within a prescribed time following the request of arbitration; or that the chosen arbitral institution shall appoint arbitrators if the parties fail to agree on the names of arbitrators within the specified time period from the request of arbitration.⁶⁷²

However, there is a danger that defining multi-stage time limits in the FTA clause will be pathological, given the difficulty of predicting how long each different phase will take to complete. In an ICC Arbitration, for example, while parties might direct the arbitrators to submit the award to the ICC within a fixed time period after the close of the main hearing, they have less control over the length of time the Court will take in approving the award. The same uncertainty applies with respect to the ICC Court's confirmation of arbitrators.

As with overall time limits, it is particularly important that the triggering events for multi-stage time limits are unambiguous. Ancillary disputes over the precise period of the limit can end up consuming more time than the parties have provided for the resolution of their substantive dispute.⁶⁷³ To illustrate the confusion which can arise, an arbitration clause providing for the use of ICC Rules and requiring that a decision be reached "*within one hundred and twenty days of the arbitrator's designation*" is pathological.⁶⁷⁴ According to Davis, Lagace, & Volkovitsch, the term "*designation*", which does not appear in the ICC Rules, could mean any of five different procedural phases of arbitration as set out in the following:

⁶⁷¹ Note on Expedited ICC Arbitration Procedure of 2002 p. 32

⁶⁷² *Ibid*

⁶⁷³ Davis/Lagace/Volkovitsch (1993) p. 81

⁶⁷⁴ Freyer (1998) p.107

- (i) the original nomination of the arbitrator by the parties or the relevant National Committee;
- (ii) the arbitrators' acceptance of the nomination and submission of an unqualified statement of independence to the Court;
- (iii) the expiration of the time limits provided for a challenge;
- (iv) the confirmation of the arbitrator by the Court;
- (v) the transmission of the file to the arbitrator after confirmation and payment of the advance costs.⁶⁷⁵

Despite these potential difficulties, with clear agreements the ICC and other arbitral institutions are capable of successfully meeting multi-stage time limits. In one case, the ICC appointed three arbitrators within 10 days of the request of arbitration. In the same case, the tribunal managed to hold a case-management conference, create the procedural timetable and sign the terms of reference within 7 days of their appointment. Additionally, they issued a decision on the provisional and conservatory measures within the same 7 day period.⁶⁷⁶

A typical FTA agreement with multi stage time limits is:

“All disputes arising out of or in connection with this Agreement shall be finally settled by arbitration under the [designated] Rules of the designated institution by a sole arbitrator. Any answers shall be filed within [15] days of the receipt of the Request for Arbitration. The [designated office of the designated institution] shall appoint the sole arbitrator within [30] days following submission of the Request for Arbitration. The arbitrator shall endeavour to render a final award within [90] days of submission of the Request for Arbitration.”⁶⁷⁷

⁶⁷⁵ Davis/Lagace/Volkovitsch (1993) p. 81

⁶⁷⁶ Freyer (1998) p.108

⁶⁷⁷ Friedland (2007) pp.88-89 and p.295 Appendix 43

4.4.1.3 Procedural Shortcuts

In addition to overall and multi-stage time limits, parties may also consider including procedural shortcuts in the arbitration clause which limit or eliminate some steps (like document production) and accordingly increase the speed of arbitration.⁶⁷⁸ The drafter may, for example, provide that the arbitral tribunal deliver the award *“as promptly as practicable”* and, *“if possible, without document production or oral hearing after their appointment.”*⁶⁷⁹

To prevent claims that due process is being violated, the clause should permit the tribunal to extend any deadlines and to introduce additional procedures as a matter of discretion.⁶⁸⁰

Born used the following wording to set procedural shortcuts in addition to time limits as a fast-track procedure:

*“The arbitrators shall conclude the arbitration no later than [...] days from the date that the claimant's statement of claim is received by the arbitrators. Unless the parties otherwise agree, a single hearing (lasting no more than [...] days) shall be conducted commencing no later than [...] days from the date that the claimant's statement of claim is received by the arbitrators. If the arbitrators determine that the interests of justice so require they may extend the dates for the hearing and/or for conclusion of the arbitration by up to a total of [...] days”*⁶⁸¹

⁶⁷⁸ Kaufmann-Kohler/Peter (2001) pp. 173-210

⁶⁷⁹ Zuberbühler/Müller/Habegger (2005) pp. 351 et seq.

⁶⁸⁰ Magnusson (2001)

⁶⁸¹ Born (2010) p. 95

4.4.1.4 Segmentation of Disputes

The broadest type of FTA arbitration clause covers any controversy or claim arising out of or relating to the contract or the breach thereof. Thus FTA may be prescribed for disputes which include not only issues of breach of contract, but also disputes concerning the very existence and validity of the contract.

If parties decide not to insert a FTA clause for all possible disputes, they can still adopt a 'segmented' approach by defining a subset of potential disputes and specifying that if a dispute arises from that subset, the dispute will be resolved by fast-track procedures. Thus the arbitration clause may prescribe fast-track only for certain types of claims, such as those involving certain dollar amounts; particular parties; types of relief; or subject matter e.g. whether the terms of an express warranty have been breached by the supplier of the product.

Another approach to segmentation is to *exclude* certain issues. For example, a company holding a US patent may not wish the validity of the patent to be adjudicated in arbitration and would insist that these issues be excluded.

Segmentation can be a solution to the criticism that not all commercial disputes are suitable for expedited treatment. However, segmentation of disputes subject to FTA may be pathological when:

- 1) the subset of claims to be addressed in the fast-track proceeding are not identified clearly (e.g. the clause provides for FTA of "financial or technical but not legal disputes", but none of these terms is defined in the agreement);

- 2) the type of claims subject to FTA is incapable of segmentation (e.g. the clause provides for FTA of “non-injunctive relief” claims – even though it is not unusual for claims for both damages and injunctive relief to be joined in a single dispute; and
- 3) the segmentation criteria are subject to manipulation (e.g. the arbitration clause provides for FTA of disputes over or below a fixed dollar amount where the claimed amount is difficult to assess at the beginning of the proceedings)

4.4.2 General drafting considerations for FTA Clauses

4.4.2.1 Did the parties agree to FTA?

Consent to arbitral proceedings is a classical foundation of arbitration.⁶⁸²

However, if the FTA agreement derives from a standard contract provided by the arbitral institution or an arbitrator, to which the parties only refer in their main agreement, or if the agreement is in a document that the parties accept without objection, one might question whether the parties have actually consented to submit disputes to FTA.⁶⁸³

Thus a problem could arise where a party is unaware of the FTA clause and is thus unable to raise any objections to it, but will nevertheless be bound its conditions. This is a particular danger in the areas of sport,⁶⁸⁴ industry-specific

⁶⁸² *Walkinshaw v. Diniz*, May 19, 1999, Arb. Int'l 2001, at 193; See also Thomas J in *Walkinshaw & Ors v. Diniz*, Commercial Court, 19 May 1999, 1999 Folio No. 522.

⁶⁸³ Böhrling-Uhle/Kirchhoff/Scherer (2006) pp. 85-87

⁶⁸⁴ Netze (1998) pp. 53-54. Paulsson (1993) p. 359; Blackhawk/Siekmann/Soek (2006) pp. 40-49 (The consent in sports disputes is typically that expressed by an applicant for a licence to participate in a sports activity, who accepts sports arbitration – henceforth under the new Appeals Arbitration Division – as a condition of the licence.)

institutions,⁶⁸⁵ and Internet disputes⁶⁸⁶ where arbitral organization rather than parties creates the arbitration agreement, namely the claimant, to sue the respondent in accordance with certain pre-defined fast-track procedures.

For instance, the Internet Corporation for Assigned Names and Numbers (ICANN), by virtue of its Internet monopoly, makes it mandatory for each of their accredited domain name registrars to incorporate ICANN's Uniform Domain-Name Dispute-Resolution Policy (UDRP) into each individual domain name registration agreement.⁶⁸⁷ In effect, the UDRP binds registrants by virtue of their contracts with registrars, to submit to mandatory administrative proceedings initiated by third-party complainants.⁶⁸⁸ The applicants for domain names are left with the option to either give their consent to the procedures or lose out on the opportunity to register their domain name. Paulsson observed that it is necessary to draw a line between ICA voluntarily agreed to by parties of approximately equal bargaining power, and ICA which is forced upon consumers through the use of a standard form of contract as in the case of ICANN and other commercial organisations.⁶⁸⁹

The parties having signed contracts with compulsory FTA clauses cannot realistically be considered to have given their consent its FTA procedures.⁶⁹⁰ As Paulsson puts it, speaking of consent when parties are not aware of what type of procedures they have agreed to, would be an abuse of language.⁶⁹¹ If there is no consent to FTA, there must be consent to regular arbitration proceedings.⁶⁹²

⁶⁸⁵ Brafford (1996) 331-362

⁶⁸⁶ Chatterjee (2006) pp. 728-736

⁶⁸⁷ ICANN, Uniform Domain Name Dispute Resolution Policy of 1999 <http://www.icann.org/dndr/udrp/policy.htm> UDRP. See also, Rules for UDRP of 2010 at <http://www.icann.org/en/help/dndr/udrp/rules>

⁶⁸⁸ Thornburg (2002) p.191

⁶⁸⁹ Speidel (2002) p. 167

⁶⁹⁰ Schultz (2006) p. 21

⁶⁹¹ Paulsson (1993) p.361

⁶⁹² Rigozzi (2005) pp.131 and 566. Along the same lines in the context of sports, Kaufman (1995) p.545

However, in practice, fast-track procedures are vital for some businesses and one may have to admit that successful international arbitrations occur without informed consent.⁶⁹³ Non-consensual arbitration may even result from multi-million dollar international transactions where 'consent' is based on treaties and national statutes.⁶⁹⁴

4.4.2.2 Avoiding Pathological Clauses

Pathological clauses are those drafted in such a way that they result in the failure of fast-track, either because their ambiguity leads to a lengthy and costly interpretation battles or, in the worst case, results in the unenforceability of an award.⁶⁹⁵

For example, problems may arise if the clause does not clearly define when the case will transform from non-binding dispute resolution methods to binding arbitration. In one case the defective clause provided, *"In the event of any unresolved dispute, the matter will be referred to the International Chamber of Commerce,"* but it failed to say whether the dispute would be settled by arbitration.⁶⁹⁶ In another case, the arbitration clause read simply: *"Arbitration – all disputes will be settled amicably."*⁶⁹⁷

Clauses have proved pathological where parties have named a specific person as a sole arbitrator who refused to act or was deceased by the time of the dispute. The court in Marcus v. Meyerson ruled that they had no authority to name a substitute for a resigning arbitrator who was specifically named in the parties' contract.⁶⁹⁸

⁶⁹³ Kaufmann-Kohler (2001)

⁶⁹⁴ Parra (1997) p. 287-364 (In Investment arbitrations consent is based on treaties or national statutes which can be construed as an offer to arbitrate and the initiation of the arbitration as an acceptance.)

⁶⁹⁵ Craig/Park/Paulsson (1990) § 9.01 at 158.

⁶⁹⁶ Redfern/Hunter (1991) p.178

⁶⁹⁷ Drewitt/Wingate-Saul (1996) p. 42

⁶⁹⁸ Marcus v. Meyerson, 170 N.Y.S.2d 924, 925-26 (1958)

Clauses may be void because the institution named to administer the arbitration proceeding or to appoint the arbitrators never existed or was not named correctly. The Hamm Court of Appeals in Germany, for instance, decided an arbitration clause was fatally ambiguous because it read, *"The parties shall proceed to litigate before the Arbitration Court of the International Chamber of Commerce in Paris with the seat in Zurich."*⁶⁹⁹ The court ruled it could not determine if the parties intended to submit to the ICC in Paris or to the Zurich Chamber of Commerce, both of which maintained permanent arbitral tribunals.⁷⁰⁰

Sometimes parties are too specific with respect to the arbitrators' qualifications and thus make it impossible to appoint a suitable arbitrator. As Park observes *"It would be tempting the devil to require that the arbitrator be an English-speaking Italian, with a French law degree and a familiarity with Mid-East construction contracts."*⁷⁰¹

Finally, any arbitration clause can be pathological if it stipulates conflicting or unclear procedures.⁷⁰² One reported arbitral clause reads: *"Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration."*⁷⁰³

This kind of pathological pre-dispute arbitration clauses is virtually guaranteed to lead to delays and costly disputes, and may well lead to the unenforceability of an award. In Gonzalez v. Hughes Aircraft Employees Fed.

⁶⁹⁹ Hochbaum, J. (1996) pp. 20-23 citing from Hamm Court of Appeals (Nov. 15 1994), Recht der Internationalen Wirtschaft (RIW) Vol. 40, p. 681 (1995) = Recht und Praxis der Schiedsgerichtsbarkeit (RPS), Supplement no. 14 (1995) to the Betriebsberater, p. 21

⁷⁰⁰ Bond (1990) p. 15

⁷⁰¹ Park (2007) p.160 See also Bernardini (1992) p. 56

⁷⁰² Davis (1991) p. 387

⁷⁰³ Craig/Park/Paulsson (1990) § 9.04 at 163.

*Credit Union*⁷⁰⁴, the arbitration clause was unconscionable because of time limits for filing claims, limits on discovery, and asymmetrical right to arbitrate. In another case the German court invalidated the arbitration clause which provided only three days to notify seller of defects and requiring non-legally qualified arbitrators. Accordingly, in the best scenario pathological arbitration clauses provides a party who is interested in delay with opportunities to forestall or even completely derail the fast-track proceedings.

4.4.2.3 Essential Clauses

Without making the FTA clause unduly complex, there are some fundamental issues that should be addressed.⁷⁰⁵

The parties to the contract should be clearly identified and they should expressly agree that to be bound by the FTA clause.

The FTA clause should also expressly state that the parties intend to resolve their disputes by FTA. While this seems obvious, parties have occasionally stipulated that controversies would be referred to an institution that administers FTA proceedings, but without mentioning FTA as the method for deciding their issues.⁷⁰⁶ Even though there have been a number of successful cases using the automatic application for FTA offered by institutions such as the SIAC and the SCAI, if the parties want their disputes decided by FTA they should say so explicitly.

The parties should specify the applicable arbitration law.⁷⁰⁷ There are obviously situations when the parties cannot agree on the applicable law and the agreement will, therefore, be silent on this issue. However, when the choice of law is not specified in the clause, parties frequently become

⁷⁰⁴ 82 Cal. Rptr. 2d 526 (Cal. Ct. App. 1999)

⁷⁰⁵ Franck (2004) p. 19-32

⁷⁰⁶ Holtzmann (1996) p. 173-194

⁷⁰⁷ Burr/Lomnbardi (2005) p. 118

entangled in lengthy argument over which law is applicable, leading to inevitable delay and additional cost.⁷⁰⁸

The place of arbitration should be specified.⁷⁰⁹ So should the number and manner of selection of the arbitrators. Choosing the arbitrators is particularly important in multi-party disputes, although the new ICC, LCIA and AAA Rules each assist by providing a method of selecting arbitrators in multi-party disputes failing an agreement by the parties.

If the FTA is to take place in the USA, it is prudent for the clause to provide that the arbitration tribunal has the power to determine its jurisdiction, including the scope of arbitrable issues.⁷¹⁰ This is because there is a difference in between different courts in the US like whether "*all disputes arising out of, connected with, or relating in any way to this agreement,*" is a broad or narrow arbitration clause.⁷¹¹ Therefore, it may be useful to include all such phrases in series or to state outright that the clause is intended to be a broad-form clause which will encompass all possible claims between the parties. To insure the breadth of the clause, some parties state the disputes covered include any relating to "*the contract, its negotiation, performance, non-performance, interpretation, termination, or the relationship between the parties established by the contract.*"⁷¹²

FTA clauses should also provide that any arbitration award rendered will be final and binding. Final means the substance of the award will not be reviewed

⁷⁰⁸ Davis/Nickles/Smit/Watkiss (1992) p. 4; Smit (1991) p. 138

⁷⁰⁹ Downie (1991) pp. 473-488

⁷¹⁰ *Mediterranean Enterprises, Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1464-65 (9th Cir. 1983) In re Kinoshita & Co., 287 F.2d 951 (2d Cir.1961) (the use of the phrase "arising under" results in a narrow arbitration clause, has been limited to its precise facts.)

⁷¹¹ *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967). The courts holds that as a matter of federal law, where the parties insert abroad arbitration clause, an arbitrator rather than a federal court decides if the principal contract has been fraudulently induced, and this rule, one of national substantive law, governs even in the face of a contrary state rule. See also *Southland Corp. v. Keating*, 465 U. S. 1 (1984); *Hartford Accident & Indemnity Co. v. Swiss Reinsurance America Corp.*, 246 F.3d 219 (2d Cir.2001); *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 444 (2006);

⁷¹² See *Ethiopian Oilseeds & Pulses Export Corp. v. Rio Del Mar Foods, Inc.*, [1990] 1 Q.B. 86, 97 ("arising out of" should be given a wide interpretation); *Ashville Investments, Ltd. v. Elmer Contractors, Ltd.*, 1989 Q.B. 488, 508; Redfern/Hunter (1991) pp.152-53.

by the courts. Binding means the parties intend that the award will resolve the dispute and be enforceable by national courts against the losing party;⁷¹³ it will not result merely in an advisory opinion that the parties are free to disregard.⁷¹⁴

By including the terms, final and binding, or an equivalent phrase – “*any disputes shall be finally settled by binding arbitration*” – parties express their intent for courts to enforce the award without reviewing the evidentiary foundations of the award. Even if the parties do not say explicitly that the award will be final and binding, they may accomplish the same result by adopting ICC, AAA or LCIA Rules. If drafters are not using institutional rules they should consider including in the FTA clause a waiver of recourse to courts of the place of arbitration (exclusion agreement) on points of law that arise in the course of FTA or after an FTA award is made.⁷¹⁵

In England, the incorporation of an institution's arbitral rules, which provide for the waiver of recourse from an arbitral award, is sufficient to prevent judicial review of the award,⁷¹⁶ while in other countries such as Switzerland there must be an express exclusion agreement.⁷¹⁷ The reason for this difference is that English courts have broad powers to review an arbitral award for errors of English law, when that law is applicable,⁷¹⁸ while in Switzerland and other countries, review of an award is limited to the few defences provided in the NYC.⁷¹⁹ The scope of the review conducted in Switzerland is thus much more limited than that available in England.

⁷¹³ US courts have held that the phrase “final and binding” means “that the issues joined and resolved in the arbitration may not be tried de novo in any court.” *M&C Corp. v. Erwin Behr, GmbH & Co.*, 87 F.3d 844, 847 (6th Cir. 1996); *Iran Aircraft Industries v. Avco Corp.*, 980 F.2d 141, 145 (2d Cir. 1992).

⁷¹⁴ Bond (1990) p. 15

⁷¹⁵ Bernardini (1992) p. 59

⁷¹⁶ *Arab-African Energy Corp. v. Olieprodukten Nederland, N.V.*, [1983] 2 Lloyd's L. R. 419 (Q.B. Com. Ct.); *Marine Contractors, Inc. v. Shell Petroleum Dev. Co. of Nigeria, Ltd.*, [1984] 2 Lloyd's Rep. 27.

⁷¹⁷ See Swiss Federal Private International Law Act of 1989, Article 192(1). See also *Clear Star Ltd. v. Centrala Morska Importowo-Eksportowa "Centromor" and Centromor S.A.*, J. Int'l Arb. 8, no. 2 (1991), cited in Bernardini, P. (1992) p. 59.

⁷¹⁸ English Arbitration Act of 1996, Section 69.

⁷¹⁹ Swiss Federal Private International Law Act of 1989, Article 190.

4.4.2.4 Exhaustion of alternative dispute resolution (ADR) procedures before the initiation of FTA

Occasionally, parties provide that non-binding ADR procedures, such as mandatory negotiation, mediation, conciliation, arb-med provisions, will occur prior to the initiation of final and binding FTA.⁷²⁰ However, a number of uncertainties may arise in such circumstances.⁷²¹

The promise to negotiate, mediate or conciliate may be seen as an opportunity for an uncooperative party to offer insufficient time for the required processes or to merely restate their position, or make unreasonable proposals or to withhold or misrepresent key information in order to delay the commencement of FTA.⁷²² Problems may also arise if it is not clearly stated in what circumstances when ADR may be considered exhausted and FTA may be commenced. If ADR involves settlement negotiations or mediation, it is generally helpful to state a time period so it is clear when ADR is exhausted.⁷²³ In extreme circumstances the recipient may argue that insufficient notice by the claimant has taken away its right to truly seek an ADR procedure.⁷²⁴ If the ADR procedures are too short, the respondent may argue that it has not been given its full substantive right to utilize an ADR option. If it is too long, the claimant may argue that the goal of FTA has been undermined by the time exhausted during the ADR period.⁷²⁵

As a corollary, parties should be careful about imposing deadlines after which FTA proceeding may not be filed. In a case before a court in Geneva, the parties' clause provided that arbitration proceeding could be filed within 30 days after the failure of negotiations. An arbitration proceeding was filed in

⁷²⁰ Berger (2006) p.6

⁷²¹ Franck (2004) p.22

⁷²² Farnsworth (2004)

⁷²³ Stipanowich/Kaskell (2001) in Commercial Arbitration at Its Best: Successful Strategies for Business Users – A Report of the CPR Commission on the Future of Arbitration. (2001) CPR Institute for Dispute Resolution : American Bar Association, Section of Business Law, Section of Dispute Resolution

⁷²⁴ Stippel/Pickl (2009) p.213

⁷²⁵ Stipanowich/Kaskell (2001) pp. 1-31

May but the opposing party claimed it was untimely as negotiations failed in January. The claimant argued they failed in April and that the arbitration was filed within 30 days after the April date. The Geneva court held the negotiations failed in January; therefore, the arbitration was not filed in time, and the arbitration failed.

Another problem may occur if parties provide for ADR to take place prior to arbitration but are unclear whether it is a condition to initiating a proceeding or merely a preferred option.⁷²⁶ In *Belmont Contractors, Inc. v. Lyondell Petrochemical Co.*⁷²⁷ the alternative dispute resolution clause read: "*If the parties cannot agree within 10 days on a different method of resolving the matter, the matter shall be submitted by the parties to and be decided by binding arbitration.*"⁷²⁸ The court held that failure to agree to another method of resolving the dispute was a condition precedent to binding arbitration, and since the parties agreed to mediation, the arbitration provision was not binding on them even though the mediation failed to settle the dispute.

Finally, some legal systems may see negotiation and mediation provisions as unenforceable.⁷²⁹ Thus, an adjudicator may hold that poorly drafted non-binding steps may be ignored simply because they make fast-track procedures unworkable.⁷³⁰

Thought should therefore be given to separating non-binding ADR phases from the FTA agreement in case they compromise the latter. If parties desire expeditious dispute resolution, they must ensure that the triggers from the non-binding ADR phases to FTA are clear and that the time limit for each phase is suitably short.

⁷²⁶ *NL Indus., Inc. v. PaineWebber Inc.*, 720 F. Supp. 293, 302-305 (S.D.N.Y. 1989) (timely filing of written protest was a condition precedent to arbitration)

⁷²⁷ 896 S.W.2d 352, 357 (Tex. App. – Houston 1st Dist. 1995, no writ)

⁷²⁸ *Ibid*

⁷²⁹ Ginkel (2004) p.4 (The New South Wales Court of Appeal upheld an obligation to undertake genuine and good faith negotiations in *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 (3 July 2009))

⁷³⁰ Lew/Mistelis/Kröll (2003) p.157 ¶7-79

4.4.3 FTA Submission Agreement (Post Dispute, Pre-Tribunal)

While the pre-dispute FTA clause provides for the arbitration of a dispute which has not yet occurred, the FTA submission agreement is a contract which the parties make after the dispute has arisen.⁷³¹

Since the submission agreement is drafted when all the issues of the dispute are known it is likely to be very detailed.⁷³² It often contains very specific provisions in relation to fast-tracking techniques, such as the expedited constitution of the arbitral tribunal, the fast-track evidentiary issues to be decided and specific provisions in relation to the procedural and substantive law as well as detailed description of each fast-track procedural steps.⁷³³

Drafting an agreement after the dispute allows parties to understand each other's position and to appoint appropriate arbitrators and to select the most suitable institutional body to administer the case.⁷³⁴ A fast-track submission agreement therefore allows parties to cooperate on the fast-track proceedings. In such an environment numerous FTA techniques and methods are available to expedite the arbitration. The parties can select the arbitral tribunal quickly because they know the best arbitrators for the dispute in question the known nature of the dispute means time limits can be set more appropriately. The agreement can also provide for an expeditious exchange of documents, limited document production requests to reduce the amount of material presented to the arbitrators, and to present only the material evidence. Parties can also select an experienced arbitrator who understands their need for timely resolution of the dispute and is available to work expeditiously on the matter.

⁷³¹ Born (2011) p.327

⁷³² Baetrns/Yotova (2011) p.433

⁷³³ Blackaby/Partasides/Redfern/Hunter (2009) p.16

⁷³⁴ Karrer (1994) p. 74

Though not an international commercial dispute, *the Abyei Arbitration* contains an excellent example of a fast-track submission agreement.⁷³⁵ In this case, the Arbitration Agreement between the Government of Sudan and the Sudan People's Liberation Movement/Army (SPLM/A) provided a fast-track dispute resolution process for the border determination problems in relation to the Abyei area.⁷³⁶ Prompted by the on-going conflict and ethnic tensions, the parties established probably the fastest public arbitration process in modern history.⁷³⁷

The fast-track submission agreement was deposited just four days after its signature by the parties to the Permanent Court of Arbitration (PCA) on 11 July 2008.⁷³⁸ The Tribunal was tasked with completing the entire arbitration within six months of its commencement, subject to the possibility of an extension for three months, if necessary.⁷³⁹ To facilitate this, the agreement imposed specific deadlines for the appointment of arbitrators, not only on both Parties, but also on the Appointing Authority and the Party-appointed arbitrators, with no previewed possibility for their extension.⁷⁴⁰ The first two arbitrators were appointed by the Government of Sudan on 14 August followed, on the very next day, by the two appointments chosen by the SPLM/A.⁷⁴¹ The five-member tribunal was completed on 27 October 2008 with the appointment of the presiding Arbitrator by the Secretary-General of the PCA, pursuant to Article 5(12) of the Arbitration Agreement.⁷⁴² The Tribunal started work as soon as it was constituted in accordance with Article 4(2) of the Agreement, i.e. on 30 October 2008, when the presiding Arbitrator signed

⁷³⁵ The Abyei Arbitration provided for the adoption of fast-track procedures by choosing the Permanent Court of Arbitration ("PCA") Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State between the Government of Sudan / The Sudan People's Liberation Movement/Army (Abyei Arbitration) available at http://www.pca-cpa.org/showpage.asp?pag_id=1306

⁷³⁶ The Permanent Court of Arbitration (PCA), Optional Rules for Arbitrating Disputes between Two Parties of Which Only One is a State (1993) is modified according to parties needs.

⁷³⁷ Baetns/Yotova (2011) p.432

⁷³⁸ Arbitration Agreement Between the Government of Sudan and the Sudan People's Liberation Movement/Army on Delimiting Abyei Area, 7 July 2008 (Abyei Submission Agreement)

⁷³⁹ Abyei Submission Agreement, Article 4(3)

⁷⁴⁰ Abyei Submission Agreement, Article 5

⁷⁴¹ Baetns/Yotova (2011) p.432

⁷⁴² Abyei Submission Agreement, Article 5(12)

his declaration of independence and communicated it to the Parties.⁷⁴³ The entire process took only 95 days, incredibly fast for a public international arbitration considering that 5 arbitrators were appointed.

The conduct of the proceedings themselves was specifically defined as fast track, in accordance with Article 8(3) of the Agreement⁷⁴⁴ and so on 24 November 2008 in its case-management conference the tribunal, in consultation with the parties, set the following procedural schedule:

- December 18, 2008: Filing of Memorials
- February 13, 2009: Filing of Counter-Memorials
- February 28, 2009: Filing of Rejoinders
- April 18-23, 2009: Oral Pleadings in The Hague

Thus, the two phases of the written pleadings consisted of simultaneous exchanges of memorials and counter-memorials within two six-week periods, followed only 30 days later by the oral pleadings.⁷⁴⁵ The written submissions exceeded 20,000 pages and the hearings went on for six days.⁷⁴⁶ In the definition of the timelines for the proceedings, in contrast to those regarding the appointment of arbitrators, the Tribunal was given the discretion of extension 'for good cause' up to a maximum of 30 days for each party.⁷⁴⁷ This provision was used by the Tribunal in the course of the proceedings to grant a 14-day extension to the Government of Sudan at its request.⁷⁴⁸

The Abyei submission agreement also benefited from the incorporation of multiple safeguards to prevent any possible obstruction or delay of the fast-track proceedings by either the parties or the arbitrators.⁷⁴⁹ These were set out in Article 4(8), providing for the continuation of the proceedings if either

⁷⁴³ Abyei Submission Agreement, Article 4(2)

⁷⁴⁴ Abyei Submission Agreement, Article 8(3)

⁷⁴⁵ Born (2011) p.92

⁷⁴⁶ Baetrns/Yotova (2011) p.433

⁷⁴⁷ Abyei Submission Agreement, Article 8

⁷⁴⁸ See Supra p.159 fn.735 the Abyei Arbitration. See Government of Sudan Counter-Memorial and Rejoinder: Errata letter dated March 16, 2009

⁷⁴⁹ Baetrns/Yotova (2011) p.434

party defaulted in submitting written pleadings or in appearing at the oral stage.⁷⁵⁰ Article 5(5) safeguarded against a default of any of the parties in appointing their respective arbitrators by empowering the appointing authority to act on their behalf.⁷⁵¹ In addition, in the event of a truncated tribunal, it provided that at least three arbitrators remained and Article 5(14) gave them discretion to continue the proceedings and to issue an award.⁷⁵² The arbitrators were able to successfully comply with the terms of the Arbitration Agreement and the Registry and the ambitious fast-track procedure was completed within a year of its commencement with the issuing of a 269-page award on 22 July 2008, accompanied by a 67-page dissenting opinion. The limit of 90 days from closure of submissions to making the award was also met as the hearings were closed on 23 April and the award followed exactly on the 90th day.

Because it was intelligently planned after the dispute and because parties gave well-thought consideration to the nature and duration of each fast-track procedural steps, the timing and scope of the pre-hearing motion, and the length of the hearing and post-hearing motion, it successfully applied in practice.

Not all submission agreements, however, are drafted so well.⁷⁵³ However, parties may be helped by using ready-made submission agreement clauses provided by arbitral institutions. WIPO recommends the following FTA submission agreement for existing disputes:

“We, the undersigned parties, hereby agree that the following dispute shall be referred to and finally determined by arbitration in accordance with WIPO Expedited Arbitration Rules:

[Brief description of the dispute]

⁷⁵⁰ Abyei Submission Agreement, Article 4(8)

⁷⁵¹ Abyei Submission Agreement, Article 5(4)

⁷⁵² Abyei Submission Agreement, Article 5(14)

⁷⁵³ Born (2011) p.100

*“The place of arbitration shall be ... The language to be used in the arbitral proceedings shall be ... The dispute shall be decided in accordance with the law of ...”*⁷⁵⁴

4.4.4 Supplementary (Post-Tribunal) Agreement

Fast-track procedures are most commonly established before arbitration begins.⁷⁵⁵ However, it is perfectly possible to fast-track an existing regular arbitration by means of a supplementary FTA agreement.⁷⁵⁶

One of the advantages of international commercial arbitration is the flexibility that can allow fast-track procedures to be adopted even without any previous agreement. Despite not giving a strict time limit or procedural shortcuts in the FTA clause or in the submission agreement, it is still possible to prescribe fast-track rules by amending the arbitration agreement during the first procedural conference.⁷⁵⁷

Once the arbitral tribunal is appointed a party may, if it desires, propose a variety of FTA techniques and methods. These include: assessing the case early, holding a preliminary conference promptly, authorizing the chairman of the three-members tribunal to make procedural decisions on his own; prohibiting document production altogether; limiting the deadline for submission or the number and/or size of the submissions; excluding or limiting the number of witnesses or experts to be used by the parties;⁷⁵⁸ requiring simultaneous submissions, utilizing witness statements in place of direct

⁷⁵⁴ WIPO Expedited Arbitration clause for existing disputes available at <http://www.wipo.int/amc/en/clauses/#5>

⁷⁵⁵ Berger (2008) p.598

⁷⁵⁶ ICC Techniques (2007)

⁷⁵⁷ Holt (2003)

⁷⁵⁸ Note on Expedited ICC Arbitration Procedure of 2002, p.34

testimony, presenting direct testimony simultaneously, limiting the number of hearing days, and dispensing with a reasoned award.⁷⁵⁹

However, parties need to consult both the tribunal and the arbitral institution if they want to apply fast-track procedures to expedite regular arbitration and there is a considerable risk that the request will be rejected.⁷⁶⁰

An arbitrator is not obliged to adopt fast-track procedures if, when he accepted to act as an arbitrator, he agreed to deal with a conventional but not a fast-track procedure.⁷⁶¹ The availability and workload that an arbitrator accepted when appointed to a regular arbitration case, may be insufficient when the arbitrator is suddenly faced with shortened time limits, an accelerated timetables and requests for strict time and cost controls.⁷⁶² The arbitral tribunal must therefore have a veto right or, as *ultima ratio*, the right to withdraw if the parties insist on conducting the arbitration on the basis of the later agreed fast-track procedures.⁷⁶³

Similarly, it is important for a supplementary FTA agreement to scrutinize the timetables and arbitration procedures of the arbitration institution selected.⁷⁶⁴ For example, under ICC Rules, certain procedures like the drafting of terms of reference and confirmation of the arbitrators by the ICC cannot be set aside. Any inconsistencies between the provisions of the supplementary FTA agreement and those non-waivable requirements of mandatory institutional rules may result in pathologies which at best could prolong, rather than fast-track the dispute resolution process. Neither the institution nor the arbitrators will approve supplementary FTA agreements, which breach fundamental principles of applicable arbitration institution or *lex arbitri*.

⁷⁵⁹ ICCA Congress Series No. 7 (1996) pp.12-250 Planning Efficient Arbitration Proceedings: The Accomplishments of Working Group I of the 1994 ICCA Vienna Congress

⁷⁶⁰ Chen (2009) p.169

⁷⁶¹ Berger (2008) p.604

⁷⁶² Fellas (2007) p.80

⁷⁶³ Rutherford (1992) p.82

⁷⁶⁴ Vasani/Tallent (2006) p. 255

Where parties insist that an ordinary arbitration is fast-tracked, but the arbitrators and institutions refuse because of mandatory rules, the parties' request may at least communicate their desire for speed and encourage the tribunal and institution to move the process more quickly.⁷⁶⁵

4.4.5 Choice between Ad-hoc and Institutional FTA

Once the parties have decided that their disputes shall be resolved through fast-track arbitration, they have a choice between designating an institution, such as the SCC, SCAI or ICC to administer the fast-track procedure or using ad hoc arbitration proceedings created outside an institutional framework.⁷⁶⁶

In drafting an ad-hoc agreement parties may make use of a set of arbitral rules drafted by the United Nations Commission on International Trade Law (UNCITRAL) which are not connected to any administering institution.⁷⁶⁷ In recent years, as international arbitration practice has expanded and more parties and lawyers have gained arbitration experience there has been increased interest in adopting UNCITRAL Rules for use in ad hoc FTA. Furthermore, ad-hoc FTA is well supported in the arbitration laws of many countries where the fast-track proceeding may be held. In the view of many experts in connection with Merger and Acquisitions (MAC) clauses the number of ad hoc FTA is expected increase in the future.⁷⁶⁸

One advantage of ad hoc FTA is that the parties avoid the administrative fees charged by arbitral institutions, which can be substantial in some cases. Ad hoc FTA is also preferable in some industries such as finance, where disputes over defaults on loans, securities and broker transactions must not only be resolved very quickly but also require skills which are more likely to be

⁷⁶⁵ Berger (2008) p.602

⁷⁶⁶ Tweeddale/Tweeddale (2007) p. 61 et seq.

⁷⁶⁷ Chen (2009) p. 172

⁷⁶⁸ Borris (2008) p.294, which considers agreements on FTA proceedings as the only alternative for MAC disputes;

possessed by industry specialists rather than arbitrators on the lists of arbitration institutions.⁷⁶⁹ Ad hoc FTA is particularly popular choice for MAC cases because in some MAC transactions even the three to six months duration of institutional FTA may still be considered too slow.⁷⁷⁰

In addition, in some industries such as Merger and Acquisitions, the parties are able to stipulate in the arbitration clause the name of arbitrators to be appointed from the industry and, at the same time, agree the arbitrators' fees with the respective arbitrators.⁷⁷¹ This means, as Sachs observes, that the administration of an arbitration institution is not needed in Merger and Acquisitions.

However, apart from these exceptional circumstances, recourse to ad hoc procedures for international FTA can be hazardous.⁷⁷² National courts are more likely to refused enforcement when there is no administering institution and no party cooperation.⁷⁷³ Also, in the absence of an administrator, parties may have to apply to the courts to resolve procedural problems on which they cannot agree.⁷⁷⁴

Ad hoc FTA also requires that the parties assume the administrative and planning responsibilities generally undertaken by arbitral institutions. They must agree on the fast-track procedures themselves and appoint the arbitrators for the commencement of arbitration.⁷⁷⁵ This may not be easy. One Austrian example of *ad hoc* FTA concerned claims based on alleged delays in

⁷⁶⁹ *Ibid*

⁷⁷⁰ DIS SREP, Section 1(2): six months (in the case of a sole arbitrator) or nine months (in the case of three arbitrators) after the filing of the statement of claim; SCC FTA Rules, Article 28: three months from the date the case was referred to the arbitrator; SCAI Rules, Article 42 (d): six months from the date the file was transmitted to the tribunal; CIETAC Rules, Article 56: three months from the date on which the tribunal was formed; JCAA Rules, Article 56: three months after the establishment of the tribunal.

⁷⁷¹ Sachs (2010) p. 1051

⁷⁷² Fiebinger/Gregorich (2008) p. 237-254

⁷⁷³ Redfern (1989)

⁷⁷⁴ Franck (2004) p.19

⁷⁷⁵ McIlwrath/Savage (2010) p.278

construction work and involved complex substantive issues.⁷⁷⁶ The arbitration agreement provided that the decision of the tribunal must be made within three months of the chairman being appointed. Owing to its strict management of the proceedings, the arbitral tribunal was able to successfully make its decision within this rigid time frame. However, the overall proceedings took far longer than the anticipated three months because the process of selecting the tribunal took almost a year.⁷⁷⁷

Moreover, with ad hoc FTA, there is no quality control review by an institution like the ICC and the arbitrators will be expected to administer the arbitral proceedings and ensure a healthy award is rendered. However, if problems arise, for example in setting the fast-track arbitration in motion or in constituting the arbitral tribunal, the parties may still require the assistance of a court or an arbitral institution, in this example to act as an appointing authority for arbitrators or to consider challenges of arbitrators.⁷⁷⁸ There is also evidence that ad hoc awards do not receive the same deference as institutional awards when they are presented to courts for enforcement.⁷⁷⁹

Cost is the primary advantage of ad hoc procedures compared to institutional arbitration.⁷⁸⁰ However, when an institution is not involved, the tribunal's administrative tasks will be correspondingly greater, which will presumably cause the arbitrator's fees and expenses to increase.⁷⁸¹ Also, if cost is critical, the role of the arbitration institution can be limited to that of an appointing authority without administrative support services.⁷⁸² The institutions are very flexible on their administrative role.

⁷⁷⁶ Fiebinger/Gregorich (2008) p. 237

⁷⁷⁷ Rowley/Levy/Baker (2009)

⁷⁷⁸ Park (1989) p. 647

⁷⁷⁹ Ulmer (1986) p.1335

⁷⁸⁰ Asken (1999) pp. 8-9

⁷⁸¹ *Ibid*

⁷⁸² Spencer (1999) p.42

More important, in ad hoc FTA arbitration, the arbitrators generally determine the amount of their own fees, whereas in an institutional setting it is usually the institution that makes, or assists in, this determination. This is a very important feature of institutional arbitration that should not be lightly disregarded. Given that the views of parties and arbitrators as to the appropriate level of the arbitrators' remuneration can diverge quite significantly, parties may be placed in an uncomfortable position if required to negotiate such matters directly with those who are to decide their case.⁷⁸³

4.4.6 Institutional FTA Procedures - variety of approaches

If the parties decide on institutional FTA there are myriad of competing arbitral institutions which differ in expertise, structure, the services they offer, the provisions of their fast-track arbitration rules, and their costs.⁷⁸⁴

Some will use their regular arbitration rules to administer FTA, but only if they receive a specific request from the parties to do so.⁷⁸⁵ Other arbitral institutions have considered it more useful to create separate FTA rules, which may be requested.⁷⁸⁶ Importantly, some institutions may apply FTA rules automatically if the amount in dispute does not exceed a certain threshold.⁷⁸⁷ Most, if not all, arbitral institutions have their own recommended model FTA clauses.

However, agreement to use a particular arbitral institution should only be made after full consideration of what the institution has to offer: the time limits and procedural constraints prescribed by its fast-track arbitration rules, the quality and expertise of arbitrators on its list; its language translation capabilities; its administrative support; its facilities; its charges and its

⁷⁸³ G.A. Res. 31/98, 31 U.N. GAOR Supp. (No. 39) U.N. Doc. A/31/39 (1976).

⁷⁸⁴ Fiebinger/Gregorich (2008) p. 238

⁷⁸⁵ Krause (2008)

⁷⁸⁶ Time And Cost In Arbitration - A Finnish Perspective in Arbitration News Vol. 16 No 2 September 2011.

⁷⁸⁷ Scherer (2005) p.229-239

international reputation for fairness and efficiency. It is beyond the scope of this document to discuss all of the functions of arbitral institutions but it will be useful to review some differences in institutional fast-track commercial arbitration rules offered by different institutions.

4.4.6.1 Fast-track procedures using regular arbitration rules

The question of how best to provide for FTA was considered by the Working Group, which drafted the 1998 ICC Rules.⁷⁸⁸ Believing that no two cases are identical and that it is very difficult to prescribe uniform rules suited to the needs of all parties and arbitrators, the Working Group did not attempt to develop a special set of expedited rules and instead created a provision contained in Article 32[1] which allows the parties to “*agree to shorten the various time limits set out in these Rules.*”⁷⁸⁹ Additionally, in Article 32(2) of the ICC Rules, they provided that “*the ICC Court on its own initiative, may extend any time limit which has been modified if it decides that it is necessary to do so in order that the Arbitral Tribunal or the Court may fulfil their responsibilities in accordance with these Rules.*”⁷⁹⁰

In 2002, the ICC published a Note on ICC FTA Arbitrations explaining the concept of Article 32 as understood by the ICC.⁷⁹¹ The ICC clearly warned parties not to set unrealistically short time limits in the FTA clause.⁷⁹² The note also explains the mandatory character of Article 32(2) which means parties cannot prevent the ICC from extending the time limits if it deems it is necessary to do so. The drafters of the 2012 ICC Rules took the same approach and Article 32 was accepted without change, other than renaming it Article 38 in the 2012 Rules.⁷⁹³

⁷⁸⁸ Rubino-Sammartano (2000) p. 803

⁷⁸⁹ ICC Rules (1998), Article 32

⁷⁹⁰ *Ibid*

⁷⁹¹ Note on Expedited ICC Arbitration Procedure of 2002, p.30

⁷⁹² Bond/Paralika/Secomb (2010) p. 386

⁷⁹³ ICC Rules, Article 38

Despite not introducing a special set of expedited rules, the ICC has seen a number of FTA cases, often of a complex nature, which were decided within one or two months after the file had been transferred to the arbitrators and the advance on cost had been paid. These exemplary ICC cases showed that parties can increase the success of fast-track arbitration by:⁷⁹⁴

- Choosing one arbitrator, not three;⁷⁹⁵
- Not allowing the arbitrator to be dilatory challenged once appointed;⁷⁹⁶
- Allowing only one round of pleadings, not two;⁷⁹⁷
- Not allowing post-hearing briefs to be filed;⁷⁹⁸
- Allocating each side with a fixed number of hours to expend as it desires at the hearing, subject to the tribunal's power to limit irrelevant or redundant submissions;⁷⁹⁹
- Stipulating that the arbitrator must render a reasoned award within 10 days from the close of hearings and that the award's allocations of costs must reflect not only who succeeded but also penalise any deleterious or wasteful conduct by a party.⁸⁰⁰

In the LCIA rules, Article 9 grants the LCIA Court the authority to curtail the time limits for the formation of the arbitral tribunal which consequently provides for an "*Expedited Formation*" of the Tribunal, but it does not give authority - at least not expressly - for an expedited procedure once the Arbitral Tribunal has been constituted.⁸⁰¹ However, depending on the circumstances, an Arbitral Tribunal constituted under the "*Expedited Formation*" procedure could conduct accelerated proceedings in the light of Article 14.1(ii) of the

⁷⁹⁴ Philippe (2002) et seq.

⁷⁹⁵ Welser/Klausegger (2009) p. 259

⁷⁹⁶ Daly/Scheller (2010) p. 67

⁷⁹⁷ Smit (1998) p. 345

⁷⁹⁸ Thomson/Finn (2005) p. 74

⁷⁹⁹ Burr/Karrer (2010) p.53 et seq.

⁸⁰⁰ Coe (2002) p.61

⁸⁰¹ LCIA Rules, Article 9

LCIA Rules as it allows the tribunal and the parties to employ fast-track procedures by tailoring the LCIA rules for fast-track arbitration.⁸⁰²

The NAI has introduced a summary proceedings mechanism⁸⁰³ modelled after the summary proceedings of the Netherlands Code of Civil Procedure.⁸⁰⁴ In addition to applying shorter time limits for both submissions and the issuance of an award, parties can agree to dispense with written memorials and/or witness examinations. This mechanism offers a variety of practical advantages, including the availability of a broad range of reliefs, an extremely expedited process (normally between a few days and few weeks) and reduced legal costs. Further, pursuant to Article 1051(3), Netherlands CCP decisions rendered in the context of summary proceedings are classified as awards in the context of the New York Convention.⁸⁰⁵

The summary proceedings can be implemented either through an ancillary procedure of Article 37 where an arbitration on the merits has been commenced and the tribunal has been constituted,⁸⁰⁶ or as a stand-alone procedure governed by⁸⁰⁷ Section 42a of the NAI Rules where no arbitration on the merits has been filed or where such arbitration has been filed but the tribunal has not yet been constituted.⁸⁰⁸ In the latter case the procedure is started by the parties filing a formal request for fast-track arbitration, accompanied by any exhibits that support the claims made with the NAI Secretariat.⁸⁰⁹

⁸⁰² LCIA Rules, Article 14

⁸⁰³ NAI Arbitration Rules of 2010, Articles 37 and 42

⁸⁰⁴ The Netherlands Arbitration Act of 2004, Article 1051

⁸⁰⁵ The Netherlands Arbitration Act of 2004, Article 1051(3)

⁸⁰⁶ Lew/Mistelis/Kröll (2003) p.549 ¶¶21-90

⁸⁰⁷ NAI Arbitration Rules of 2010, Article 37

⁸⁰⁸ *Ibid*, Article 42

⁸⁰⁹ *Ibid*, Articles 37 and 42(a), 42b(1) and (2),

The NAI summary proceedings are automatically available to parties that have agreed on the application of the NAI Rules and where the place of arbitration is in the Netherlands.⁸¹⁰

4.4.6.2 Specific FTA Rules – “Opt-in”

While institutions like ICC, LCIA and NIA consider that their regular arbitration rules are flexible enough to be adapted for fast-track procedures, others have followed a different path.

The 1994 Expedited Arbitration Rules of the World Intellectual Property Organization (WIPO) were one of the first examples of a set of arbitration rules created specifically to achieve fast-track arbitration.⁸¹¹ The rules were developed to settle disputes in the domain of intellectual property, such as disagreements over trademarks, but other types of disputes are not excluded. Under WIPO Expedited Rules the arbitration can end in approximately fifty days, or even faster if the parties agree to shorten the 20-day time limit for submission of the answer to the statement of claim and defence, or permit no extensions.

Other sets of rules specific to FTA followed WIPO's lead.⁸¹² Prominent examples are:

- The 2010 Rules for Expedited Arbitrations of the Stockholm Chamber of Commerce (SCC)⁸¹³
- The 2011 Expedited Rules of Arbitration of the Australian Centre for International Commercial Arbitration (ACICA)⁸¹⁴
- The 2011 Fast Track Rules of the Kuala Lumpur Regional Centre for Arbitration (KLRCA)⁸¹⁵

⁸¹⁰ Bend/Leijten/Ynzonides (2009) p.190

⁸¹¹ WIPO FTA Rules

⁸¹² See Appendix 2

⁸¹³ SCC FTA Rules

⁸¹⁴ ACICA FTA Rules

⁸¹⁵ KLRCA FTA Rules

All of these rules are separate from the institutions' regular arbitration Rules. To use them requires explicit agreement to FTA either in the arbitration clause or in the submission agreement - hence their common name of 'opt-in' rules. These detailed rules govern the entire fast-track process, from the initiation of the claim right through to the final award.

As almost all of these arbitration institutions also provide separate sets of regular arbitration rules, parties can create an arbitration clause which combines fast-track and regular track procedures by specifying in what circumstances which sets of rules will apply. In the following wording from the SCC, parties select FTA Rules as their first choice but let the SCC determine whether or not regular arbitration rules shall apply:

*"The Rules for Expedited Arbitrations shall apply, unless the SCC in its discretion determines, taking into account the complexity of the case, the amount in dispute and other circumstances, that the Arbitration Rules shall apply. In the latter case, the SCC shall also decide whether the Arbitral Tribunal shall be composed of one or three arbitrators."*⁸¹⁶

4.4.6.3 Specific FTA Rules – "Opt-out"

Some institutions have a separate set of FTA rules which, as above, can be requested in the normal way. However, for disputes valued *below* a certain threshold FTA rules will be applied automatically and require a request *not* to apply them. Thus they are commonly called opt-out rules. Prominent institutions that operate this approach include:

- The Swiss Chambers' Arbitration Institution (SCAI) in Article 42 of their Expedited Procedures (2004)⁸¹⁷

⁸¹⁶ SCC's Model FTA Clauses are available at <http://www.sccinstitute.com>

⁸¹⁷ SCAI Rules

- The China International Economic and Trade Arbitration Commission (CIETAC) – in their Summary Procedures (1994)⁸¹⁸
- The Council of the Hong Kong International Arbitration Centre (HKIAC) in Article 38 of their Administered Arbitration Rules (2008)⁸¹⁹
- The Court of Arbitration of Madrid Official Chamber of Commerce and Industry of Madrid (CAMARA) in Article 50 of their Rules of Arbitration (2009)⁸²⁰

The 'opt out' approach was pioneered by institutions sited in Geneva, Basel and Lugano who joined to form the SCAI in 2004.⁸²¹ Parties can submit disputes to the SCAI Expedited Procedure, either in the arbitration agreement or, after the dispute arises, within the ordinary arbitration rules framework.⁸²² However, if the amount in dispute is below CHF 1,000,000⁸²³ arbitration is conducted under fast-track procedure by a sole arbitrator, even if this has not been requested by the parties.⁸²⁴

Provided that the amount in dispute exceeds CHF 1,000,000 parties enjoy complete freedom to opt in to of fast-track procedure and later revert to regular arbitration. However, if the amount in dispute does not exceed CHF 1,000,000 parties are restricted to using only FTA.

⁸¹⁸ CIETAC Arbitration Rules of 1994, Articles 64-74; The rules are recently revised in 2012. See CIETAC Rules Articles 54-62 in which the RAM 500,000 Yuan threshold for automatic application of fast-track procedures increased to RAM 2,000,000 Yuan (approximately USD 320,000 equivalent). Considering the CIETAC dealt with 560 international arbitration cases in 2009, 418 in 2010 and 470 in 2011, and majority of disputes are below USD 500,000 threshold. Fast Track Arbitrations are expected to boost in the next years.

⁸¹⁹ HKIAC Rules

⁸²⁰ CAMARA Arbitration Rules of 2009

⁸²¹ CCIG Rules of 1992, Article 31 CCIG joined to SCAI in 2004 as one of the seven Swiss Chambers Arbitral institutions. Article 42 of the SCAI Rules of 2012 currently applies for FTA. There are two other Swiss Chambers with expedited arbitration rules which also joined to SCAI in 2004: Article 41 of the BCC Rules of 1995 and Article 48 of the TCC Rules of 1997

⁸²² SCAI Rules, Articles 1(3) and 42(1)

⁸²³ CHF 1,000,000 is about USD 1,095,290 at the exchange rates prevailing when these lines were written on 15 January 2013 (1 USD = about 0.913 CHF).

⁸²⁴ SCAI Rules, Article 42

The opt-out approach of the SCIA's Expedited Rules has become a model for many other institutions. CIETAC incorporated very similar rules in 1994⁸²⁵ but with a much lower monetary threshold of CNY 500,000⁸²⁶ for the automatic application of fast-track procedures. Although under the revised 2012 Rules⁸²⁷ the threshold is increased to CNY 2,000,000⁸²⁸ it is still much lower than the monetary threshold of CHF 1,000,000 set out in the Article 42 of the SCAI Rules.⁸²⁹ In the case of CIETAC, the institution has similar authority to determine whether or not to apply the fast-track procedure after a full consideration of relevant factors, but where no monetary claim is specified or the amount is in dispute, the authority is not clear.⁸³⁰ Unlike the SCAI Rules, the CIETAC Rules are not silent on what should happen if the claimed amounts exceed or fall short of the monetary threshold. Under CIETAC Rules arbitral procedures, whether started on fast-track or regular track, will not be affected with counterclaims or withdrawals or with later increases or decreases in the amount in dispute, unless the parties agree or the arbitral tribunal decides that a change is necessary.⁸³¹ A similar approach is adopted by CAMARA where the decision to conduct an arbitration case using fast track procedure is final. This aims to minimize the effects of later changes in the amount in dispute.

⁸²⁵ CIETAC Arbitration Rules of 1994, Articles 64-74 Chapter III Summary Procedures Art 64 states "this Summary Procedure shall apply to any case in dispute where the amount of the claim totals not more than RAM 500,000.00 Yuan"

⁸²⁶ RAM 500,000 is about USD 80,428 at the exchange rates dated 15 January 2013 when these lines were written. (1 USD = about 6.216 CNY).

⁸²⁷ SIAC Rules, Article 5

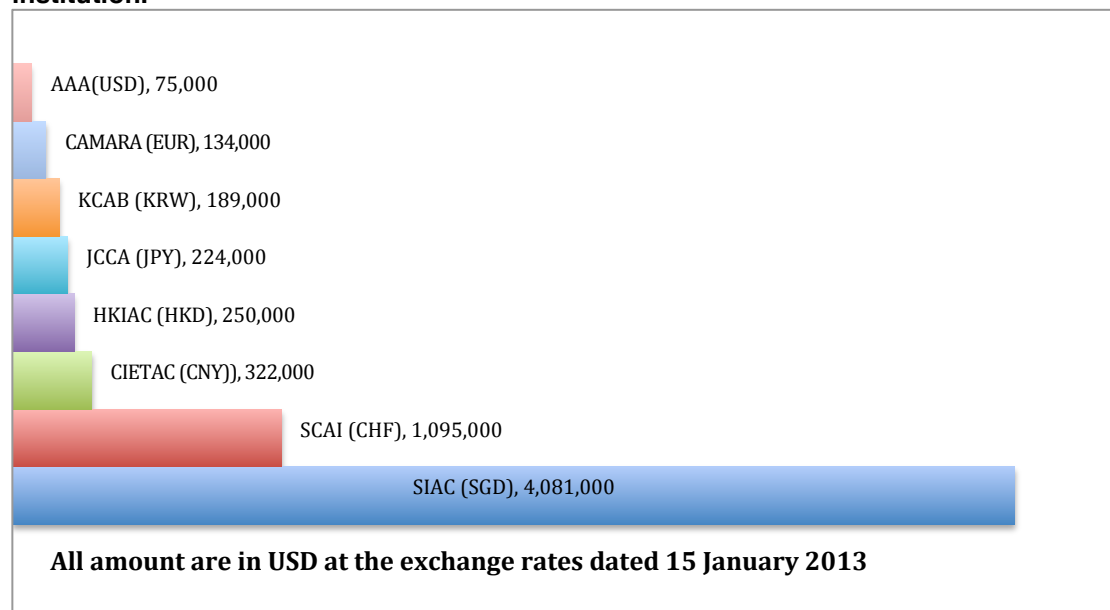
⁸²⁸ RAM 2,000,000 is about USD 321,713 at the exchange rates dated 15 January 2013 when these lines were written. (1 USD = about 6.216 CNY).

⁸²⁹ SCAI Rules, Article 42(2)

⁸³⁰ CIETAC Rules Article 54(2)

⁸³¹ CIETAC Rules Article 61

Figure 14: Monetary threshold beneath which FTA is automatically applied, by institution.



Source: Institutional FTA Rules

By contrast, under KCAB rules, fast-track procedures are automatically altered if at any time during the dispute resolution process the claimed amount exceeds the threshold through counterclaims or in other ways.⁸³²

The SCC provides a clause to apply Regular Arbitration or FTA rules depending on the value of the claim:

“The Rules for Expedited Arbitrations shall apply where the amount in dispute does not exceed EUR 100,000. Where the amount in dispute exceeds EUR 100,000 the Arbitration Rules shall apply. The Arbitral Tribunal shall be composed of a sole arbitrator where the amount in dispute exceeds EUR 100,000 but not EUR 1,000,000. Where the amount in dispute exceeds EUR 1,000,000, the Arbitral Tribunal shall be composed of three arbitrators. The amount in dispute includes the claims made in the Request for Arbitration and any counterclaims made in the Answer to the Request for Arbitration.”⁸³³

⁸³² KCAB Arbitration Rules of 2011, Articles 38-44 Chapter 6 Expedited Procedures applies 1. where the claim amount does not exceed KRW 200,000,000; or 2. where the parties agree to be subject to the expedited Procedures.

⁸³³ SCC's Model FTA Clauses are available at <http://www.sccinstitute.com>

Not every case needs speed and parties' unwillingness to accept fast-track procedure automatically could be one of the circumstances that institutions with an opt-out approach take into account when deciding whether to make an exception to the automatic application of fast-track procedures.⁸³⁴ It would certainly not be in the interest of the arbitral institutions to impose upon the parties a product that neither wants.⁸³⁵

However, in many instances it would not be practicable to alter the format of the arbitration once it is under way.⁸³⁶ Attempting to transform pending regular proceedings, in which the Tribunal has been constituted, into an expedited arbitration would likely complicate matters instead of simplifying them and thus foster delay instead of speed.⁸³⁷ In particular, it would be very difficult to accelerate a regular arbitration once the timetable has been finalised. However, if the parties and the arbitrator agree they can of course at any stage revisit the timetable, for instance if a main claim has been withdrawn and a hearing can be cancelled.

Although it would be easier to shift from an accelerated arbitration to a regular format, an increase in the amount in dispute does not necessarily mean that there has been an increase in the complexity of the issues to be resolved.⁸³⁸ Thus, in itself, an increase in the amount disputed offers no compelling reason to modify the timetable of the arbitration.⁸³⁹ The same would not be true where an increase of the amount in dispute is coupled with additional complexities of the case.⁸⁴⁰

According to Spada, to change from FTA to regular arbitration, or vice versa, it should be sufficient to have a unilateral request by one of the parties.⁸⁴¹

⁸³⁴ SCAI Rules, Article 42(2)

⁸³⁵ Geisinger, E. (2004) p.79 (Can you make others happy despite them?)

⁸³⁶ *Ibid*

⁸³⁷ Zuberbühler (2006)

⁸³⁸ Rubino-Sammartano (1998) p. 148

⁸³⁹ *Ibid*

⁸⁴⁰ Lowenfeld (1997) p. 649 et seq.

⁸⁴¹ Spada, F. (2005) p.28

Scherer, by contrast, states that bilateral requests from both parties should be required.⁸⁴²

Unilateral FTA clauses provide a solution to this problem by allowing a request from one of the parties, without the agreement of the other, to determine whether the matter will be brought to fast-track arbitration or to ordinary arbitration after the dispute.⁸⁴³ Party autonomy would suggest that this is acceptable, although it might be seen to offend against procedural equality.⁸⁴⁴ Article 42.2 of the SCAI Rules is a clear example of this approach in which the Chambers decide whether fast-track procedures apply in the first place. By applying *mutatis mutandis* to Article 42.2 of SCAI, Geisinger⁸⁴⁵ considers that the decision to modify the format of the proceedings would have to be taken by the Chambers in view of all relevant circumstances.⁸⁴⁶ The decision would be made upon the request of either party or of the Arbitral Tribunal. If all parties and the Tribunal make a joint request, there would be little point for the Chambers to deny it. In any event, it is obvious that the Chambers cannot modify the procedure without first consulting with the parties and the Tribunal.

The Swiss Rules of Arbitration allow automatic application of FTA proceedings even in cases where the claimed amount in dispute is well-above the monetary threshold.⁸⁴⁷ Though consultation with the parties is required, the decision to use FTA can be made even over the objections of one or more parties after taking all 'relevant and applicable' circumstances into account.⁸⁴⁸

The application of FTA by the authority of institutions rather than parties is also possible under Article 5.1 of the Rules of the SIAC which grants its chairman the authority to decide the appropriateness of FTA procedures in

⁸⁴² Scherer (2005) p. 232

⁸⁴³ Carter, J. H. (2011)

⁸⁴⁴ Richard (2004)

⁸⁴⁵ Geisinger, E. (2004) p.80

⁸⁴⁶ Spada, F. (2005) p.29

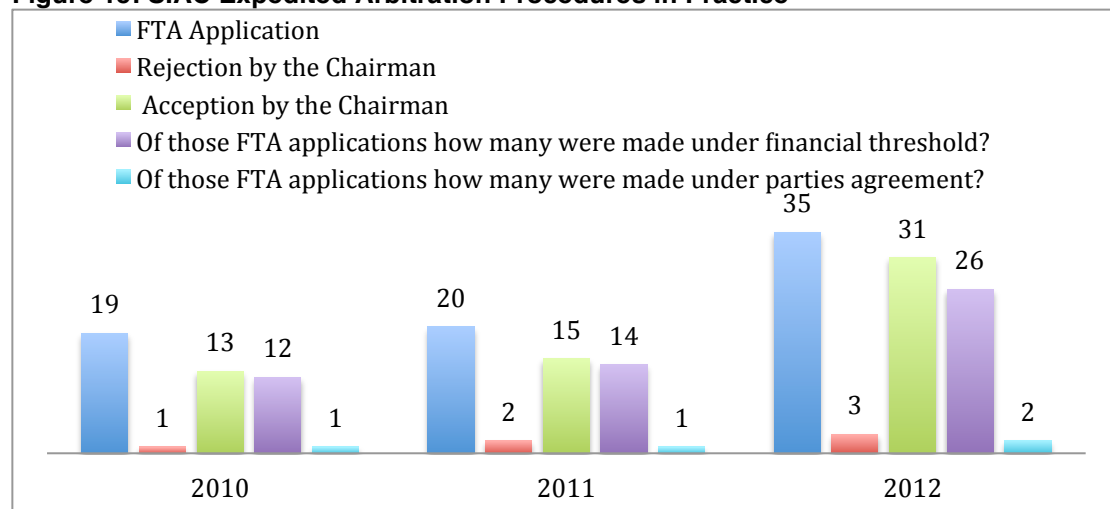
⁸⁴⁷ SCAI Rules, Article 42(2)

⁸⁴⁸ *Ibid*

cases of exceptional urgency.⁸⁴⁹ Thus the institution may decide on FTA even though the parties may oppose the decision by arguing that there is no exceptional urgency.

Furthermore, the SIAC grants its chairman the authority to decide the appropriateness of FTA procedure where the amount in dispute is no more than SGD 5 million (about USD 4 million) and one of the parties makes an application for FTA.⁸⁵⁰ The statistics show the chairman rarely rejects FTA applications. In the first 6 months of the SIAC Expedited Rules there were 19 FTA applications, 13 were accepted and 1 was rejected by the chairman while 4 settled or were taken back by the party making the FTA request. In 2011, about 20 FTA applications were made, 15 of those were accepted and 2 were rejected by the chairman while the remaining 3 were again settled or pulled back. In 2012, a record 35 FTA applications were made, 31 of these were accepted, 3 were rejected by the chairman and only one was settled or pulled back. Thus out of 74 FTA applications made in the past 2.5 years, 59 were successful. Only 6 cases (less than 10%) were rejected.⁸⁵¹

Figure 15: SIAC Expedited Arbitration Procedures in Practice



Source: SIAC Annual Statistics Arbitration Cases

⁸⁴⁹ SIAC Rules, Article 5(1)

⁸⁵⁰ SGD 5,000,000 is about USD 4,081,432 at the exchange rates prevailing when these lines were written on 15 January 2013 (1 USD = about 1.225 SGD).

⁸⁵¹ SIAC Annual Statistics Arbitration Cases

The breadth of these provisions under many institutional arbitration rules suggests that fast-track procedure could be applied automatically without express parties' consent but by the decision of arbitral institutions in accordance with the implicit consent of parties by agreeing into particular institutional arbitration rules.

4.4.7 The seat of Fast-track Arbitration

Consistent with the principle of party autonomy, the parties to an international arbitration are generally free to choose where their arbitration takes place. The place of the arbitration (or the "seat" or the "forum" or the "locus arbitri") is highly relevant both to the conduct of the fast-track arbitration and to the enforceability of the fast-track award.⁸⁵² Parties should consider the following factors related to the legal system of the seat:

- 1) It is especially important to select a seat whose arbitral awards will be enforceable in other countries (e.g., a country that has ratified the New York or Panama Conventions recognizing arbitral awards).⁸⁵³
- 2) The seat's law should recognize the agreement to fast-track arbitration as valid.⁸⁵⁴ Article V(1)(a) of the New York Convention prescribes that the validity of an arbitration agreement may be determined by the law of the country where the award was made, so compliance with local laws is important.⁸⁵⁵
- 3) Because the arbitral seat is usually the country whose courts will hear an action to set aside an award, it is important to consider the scope of review of awards available in that country.⁸⁵⁶

⁸⁵² Capper (2009)

⁸⁵³ Koch (2009) pp. 267-292

⁸⁵⁴ Lalive (1984)

⁸⁵⁵ *Chalbury McCouat International Ltd v PG Foils Ltd* [2010] EWHC 2050 (TCC)

⁸⁵⁶ *Southern Pacific Properties Ltd. v. Arab Republic of Egypt*, 2 Int'l Arb. Rep., No. 1, at 17 (Cass. Civ. 1re 1987) (French court's reversal of ICC arbitral award rendered in Paris).

- 4) The national courts of the seat should not unnecessarily interfere in fast-track arbitral proceedings, thereby creating an incentive for dilatory tactics and expensive procedural disputes.⁸⁵⁷
- 5) The seat's courts should, however, assist the fast-track proceedings when necessary (e.g., by compelling arbitration or by enforcing document disclosure orders made by the tribunal).⁸⁵⁸
- 6) The host country should allow non-nationals to appear as counsel in international arbitration proceedings. This is not always the case. For example, Japan and Singapore have at times required that the parties' representatives be lawyers admitted to practice, and who reside, in the seat's state.⁸⁵⁹ Other countries require that representatives be lawyers (e.g., Indonesia, Israel, Saudi Arabia and Spain),⁸⁶⁰ while others require representatives to present a power of attorney to the arbitral panel (e.g., Argentina, Greece, Austria).⁸⁶¹
- 7) The seat should not unduly restrict the choice of arbitrators. In Saudi Arabia, arbitrators must be Muslim and male.⁸⁶² In Venezuela, arbitrators must be lawyers licensed to practice law in Venezuela if Venezuelan law applies.⁸⁶³ Certain other countries have also required that arbitrators be nationals of their country.⁸⁶⁴
- 8) The seat of the arbitration may also determine the *lex arbitri*.⁸⁶⁵ the language of the arbitration if the parties have not specified the language; time-limits for commencing an arbitration; interim measures

⁸⁵⁷ *Shashoua & Ors v Sharma* [2009] EWHC 957 (Comm) (07 May 2009); *C v D* [2007] EWCA Civ 1282; *C v D* [2007] EWHC 1541 (Comm) (28 June 2007).

⁸⁵⁸ Baker/Romman (2010) pp. 9-14

⁸⁵⁹ Rivkin (1990) pp. 11-15

⁸⁶⁰ *Ibid* 12

⁸⁶¹ *Ibid* 14

⁸⁶² Bond (1990) p. 18

⁸⁶³ Rodner (1997) p. 99

⁸⁶⁴ Bernardini (1992) p. 54

⁸⁶⁵ Hochbaum (1996) p. 20

of protection; other matters including rules concerning the disclosure of documents, the evidence of witnesses and the powers of the arbitrator.⁸⁶⁶

If parties fail to agree to the seat of the arbitration, the rules of some institutions allow the arbitrators to decide the seat, based on the circumstances of the parties and the case;⁸⁶⁷ other institutions' rules authorize the institution itself to select the seat.⁸⁶⁸

It should be noted that choosing a seat does not mean that all arbitral proceedings have to take place there; the arbitrators generally have discretion under the arbitral rules to conduct some proceedings at other venues.⁸⁶⁹ It may often be convenient for the parties or the arbitral tribunal or the witnesses (who may all be from different countries) to hold meetings or even hearings in a country other than the designated seat.⁸⁷⁰ The legal place of the fast-track arbitration remains the same even if the physical place changes from time to time.

⁸⁶⁶ Wilske/Fox (2009) p.383

⁸⁶⁷ AAA/ICDR International Arbitration Rules of 2009, Article 13 (administrator may initially determine the place of arbitration, subject to the power of the arbitrators to determine the seat); UNCITRAL Rules, Article 18

⁸⁶⁸ ICC Rules, Article 18 (ICC International Court of Arbitration shall fix the place of arbitration if not agreed by the parties); LCIA Arbitration Rules, Article 16.1 (seat shall be London unless and until the LCIA Court determines that another seat is more appropriate)

⁸⁶⁹ ICC Rules, Article 18 (2) (arbitrators may conduct hearings or deliberate at any location they deem appropriate); AAA/ICDR International Arbitration Rules of 2009, Article 13 (arbitrators may hold conferences, hear witnesses or inspect property at any place they deem appropriate); LCIA Arbitration Rules, Article 16.1 (arbitrators may hold hearings and deliberations at any convenient location)

⁸⁷⁰ However the choice of a seat of arbitration does not preclude the tribunal from conducting hearings during the proceedings in another location for convenience: *Union of India v McDonnell Douglas Corp* [1993] 2 Lloyd's Rep 48. In such a case the procedural law of the seat continues to govern the arbitration.

4.4.7.1 The law governing FTA proceedings (*lex arbitri*)

Generally, parties do not specify in an arbitral clause the procedural law to be applied to the arbitration proceeding.⁸⁷¹ In the absence of a choice, arbitrators typically apply the procedural law of the seat of the arbitration (i.e. the *lex arbitri*).⁸⁷² Selecting a seat in a particular country therefore generally brings with it the law of that country unless the agreement provides otherwise.⁸⁷³

The *lex arbitri* is important because it determines all matters relating to the form and validity of FTA agreements, conduct of fast-track procedures and enforceability of FTA awards. For example, questions regarding how arbitrators are appointed, how they can be challenged, what their powers are with regard to the admission of fast-track evidence, time limits and other related issues, are all referable to the *lex arbitri*.⁸⁷⁴

In light of the traditional theory and practice of ICA, there is close linkage between the law governing the proceedings and the seat of arbitration.⁸⁷⁵ It is said that "*the lex arbitri is the lex loci arbitri*"⁸⁷⁶ This is called "*the seat theory*" and originates from jurisdictional theory. It argues that the contractual root of an international arbitral tribunal is a *façade* which conceals the legally crucial, adjudicatory character of the tribunal. The reason to apply the *lex loci arbitri* to the proceedings of arbitration is that the law of the *situs* imposes itself because the parties have set up, after all, a tribunal. Since the parties create a private jurisdiction - the arbitral tribunal - and this jurisdiction is situated inside the territory of certain country, the local sovereign must have the competence to regulate all activities taking place within the realm, including the creation and exercise of such jurisdiction.⁸⁷⁷ From another perspective, it is also

⁸⁷¹ Ulmer (1986) pp. 1342-1343.

⁸⁷² *India Company v. Pakistani Bank*, Award in ICC Case No. 1512 of 1971, in Collection of ICC Arbitral Awards 1974-1985 at 3 (Kluwer 1990); *Italian Claimant v. Belgian Respondent*, Award in ICC Case No. 2272 of 1975, in Collection of ICC Arbitral Awards 1974-1985 at 11-12 (Kluwer 1990).

⁸⁷³ See supra p. 179 fn. 852

⁸⁷⁴ Tweeddale/Tweeddale (2007) ¶7-39 *et seq.*

⁸⁷⁵ *James Miller & Partners Ltd. v Whitworth Street Estates (Manchester) Ltd.* [1970] 1 Lloyd's Rep. 269

⁸⁷⁶ Petrochilos [2004] p. 22; Park (1983) p. 23

⁸⁷⁷ Petrochilos (2004) p. 23

believed that every right or power a private person enjoys is inexorably conferred or deprived by a system of municipal law, and there is no exception regarding the arbitration agreement and the arbitral proceedings.⁸⁷⁸ The *lex loci arbitri* is the source of rights and obligations and therefore all arbitral proceedings should be subject to it.⁸⁷⁹

The seat theory has been widely-adopted in conventions and national laws, such as Article 5.1(d) of the NYC, Articles 19, 34(2)(a)(iv), 36(l)(a)(iv) of the UNCITRAL Model Law⁸⁸⁰, and Article 6(2) of the KLRCA Fast-track Rules. Those provisions emphasize the link between the place of arbitration and the law governing the arbitral procedure, whether *the lex loci arbitri* is given equivalent weight to the agreement made by parties (dualism of application),⁸⁸¹ or whether the agreement of the parties is followed in principle and only when such agreement fails is the *lex loci arbitri* applied, or merely by applying the mandatory constraints of the *lex loci arbitri*.⁸⁸²

However, the seat theory is not totally without flaw. One vital criticism is that it overestimates the connection between the place of arbitration and the law governing arbitral procedure. First, as transportation and communication networks develop, arbitral proceedings often happen at more than one place. For example, whether for the sake of convenience or necessity, the taking of evidence and the deliberation of the arbitral tribunal, may well be conducted outside the place of arbitration. In other words, the "seat of arbitration" is merely defined as "the judicial seat of arbitration" by parties or arbitrators.⁸⁸³ It is not so much a particular geographic site, but rather a conceptual notion of law.

⁸⁷⁸ Park (1983) p. 21-52

⁸⁷⁹ Petrochilos (2004) p. 23 p. 22 It is even more radical to develop the view that "international arbitration" is a misnomer because every arbitration is "subject to a specific system of national law"

⁸⁸⁰ UNCITRAL Model Law, Articles 19, 40 and 50

⁸⁸¹ Redfern/Hunter (2004) p.83 ¶2-14

⁸⁸² Park (1983) p. 30 et seq.

⁸⁸³ Petrochilos (2004) p. 24

Furthermore, in many situations, the place of arbitration is chosen merely as a place of neutrality which has nothing to do with the law governing substantive issues, nationality of parties or factual elements of business.⁸⁸⁴ It is undeniable that the choice of place of arbitration may be important as it can affect the language of the arbitration, whether the legal counsel are admitted to practice law at the place of arbitration, whether the location of site is easily accessible to both sides with good international travel service, the internal and external arbitration expenses, its convenience to witnesses or for viewing physical evidence, whether appropriate conference rooms exist for hearings, and if the country of seat of arbitration is a signatory state of the NYC.⁸⁸⁵ However, the choice of place of arbitration may not relate to the substantive facts of the case.⁸⁸⁶

Since a large number of ICA cases can bring in considerable benefits for the country of the seat of arbitration,⁸⁸⁷ countries seek to attract more international arbitrations by competing for the best place of arbitration.⁸⁸⁸ One way governments can increase their market share is to reform their national arbitration laws to offer more simplicity and flexibility. By contrast, too much intervention from domestic courts will deter international arbitrations.⁸⁸⁹

Therefore, with the supposition that less constraint draws more preference, over-emphasizing the relationship between the selection of place of arbitration and *lex loci arbitri* and assuming as a rule that the seat of arbitration is the one and the only important connecting factor of *lex arbitri* seem to lump together all and sundry.⁸⁹⁰ It not only ignores the diversity of cases but also unduly simplifies this issue.⁸⁹¹

⁸⁸⁴ Craig (1995) p. 2

⁸⁸⁵ Carter (2007) p. 117-124

⁸⁸⁶ Craig/Park/Paulsson (1990) p. 463

⁸⁸⁷ For instance, work for lawyers at place of arbitration, incentives to stimulate the hotel and hospitality industry, building prestige as spin-off to hosting international arbitrations for future development.

⁸⁸⁸ Wilske/Fox (2009) pp. 383-418

⁸⁸⁹ Wilske, S. (2009) p.187

⁸⁹⁰ Hochbaum, J. (1996)

⁸⁹¹ Capper (2009)

In the 1960's the seat theory started to face challenges and the "*de-nationalization/localization theory*"⁸⁹² emerged. It contended that international arbitration should not be bound by municipal arbitration law, especially not the law of the country where the award is made.⁸⁹³ According to the principle of party autonomy (*l'autonomie de la volonte*), the law governing arbitral procedure and the procedural rules of arbitration should both be determined by the parties, or failing such agreement, by the arbitral tribunal in the manner it considers appropriate.⁸⁹⁴ According to localization theory, International commercial arbitration is sufficiently regulated by the rules decided by either parties or tribunal and there is no need for *lex loci arbitri* to interfere in the proceedings. In addition, the control of arbitral proceedings should only come from the law of the place of enforcement of the award, not the law of the place of arbitration.⁸⁹⁵ Notably, de-nationalization theory is not only applied to procedural matters, but also substantive matters and rules of conflict of laws to be agreed by parties, such as international law or *lex mercatoria* served as a basis to resolve disputes.⁸⁹⁶

However, the de-nationalization theory does raise several queries. In addition to the issue of whether ICA can exist in a legal vacuum detached from the control of national laws,⁸⁹⁷ in reality there may be a practical need to use the *lex loci arbitri*.⁸⁹⁸ The arbitral tribunal as an alternative dispute resolution method is after all different from the role of the court. Without the power of enforceability, it depends on the court to address interim measures and the

⁸⁹² Redfern/Hunter (2004) p.89-91 ¶2-25; Petrochilos (2004) p. 35-41

⁸⁹³ Hanotiau (2011) p. 90

⁸⁹⁴ This thesis suggests that under the de-nationalization theory there is no need to distinguish between the law governing arbitral procedure and procedural rules of arbitration. The reason is that if a particular national law is chosen to be the law governing all arbitral proceedings, the application of the law itself is not based on the power from the sovereignty of such country, but rather the contractual characteristic of the agreement made by parties based on the principle of party autonomy. The parties can also adjust any content of such law to be more suitable for special needs of their case, which has already departed from the notion of the jurisdictional theory. Therefore, the chosen law can be conceptually perceived as "*one kind of selected procedural rules of arbitration*", with more similarity with institutional arbitration rules which comparatively have a well-structured framework to be applied to FTA directly.

⁸⁹⁵ Redfern/Hunter (2004) p.90 ¶2-26

⁸⁹⁶ Petrochilos (2004) p. 35-37

⁸⁹⁷ Redfern/Hunter (2004) p.92 ¶2-29

⁸⁹⁸ Domenico/Martin (2001) p. 22; Redfern/Hunter (2004) p.76-77 ¶2-02

taking of evidence. Hence, the notion that international arbitration can be perfectly regulated by its own rules might be a little unrealistic. Besides, many aspects in arbitral proceedings require court intervention to fill gaps and render opportunities of recourse against awards, such as the appointment of arbitrators,⁸⁹⁹ setting aside arbitral awards⁹⁰⁰ etc. If the *lex loci arbitri* is totally abandoned, the domestic court will have nothing to apply or be forced to apply unfamiliar foreign laws, which may also cause problems. The application of *lex loci arbitri* is not really defending the interests of the state of the seat, but the rights of the arbitrating parties to ensure the fairness, effectiveness and practicality of arbitration.⁹⁰¹ More crucially, the *lex loci arbitri* confers its nationality on the award of the arbitral tribunal, so that it may benefit from any international treaties, such as the NYC, to which its country of origin is a party.⁹⁰²

Both the seat theory and the de-nationalization theory have their pros and cons. As transnational business prospers, the *lex loci arbitri* can be a major obstacle to fast-track arbitral proceedings, and may even affect the enforcement of awards. Undoubtedly, the de-nationalization theory attempts to address these issues but many problems still remain. If states are not willing to loosen their control over international arbitration conducted inside their territory by allowing parties to choose their preferred *lex arbitri*, the "invisible hand" of local courts will eventually dominate arbitral procedure.⁹⁰³ At present, arbitral proceedings are constrained by the *lex loci arbitri* and parties (especially their legal counsellors) or the arbitral tribunal must pay

⁸⁹⁹ UNCITRAL Model Law, Article 11(3)

⁹⁰⁰ UNCITRAL Model Law, Article 34(2)(a)(iv)

⁹⁰¹ Petrochilos (2004) p. 25-26

⁹⁰² Redfern/Hunter (2004) p.91 ¶2-28

⁹⁰³ Another idea is to expect the adoption of the UNCITRAL Model Law of states to help promote the uniformity and globalization of arbitration. But in practice, it is almost illusory to build such "level playing field" because as the Model Law itself is not binding to members of the U.N., states of different culture and historical background are unlikely to adopt the Model Law without any modification. Hence the problem still remains. *Ibid* at 89-90 ¶2-25 ¶2-26

attention to the selection of the seat of arbitration to avoid undue intervention from local courts and to maximise the benefits for both parties.⁹⁰⁴

4.4.7.2 Choice of a foreign procedural law

The law governing arbitral procedure and procedural rules of arbitration are both important but the nature and scope of them are quite different.

Occasionally parties may agree to a seat with an undesirable procedural law.⁹⁰⁵ In that case, the parties may specify different procedural rules from the law governing the place of arbitration.⁹⁰⁶ If there is a contradiction between them, the mandatory provisions of *lex arbitri* prevail.⁹⁰⁷ The procedural rules and *lex arbitri* are independent but also affected by each other. It is impossible to totally cut one out from the other.

The diagram below shows the relationship between *lex arbitri*, *lex loci arbitri* and procedural rules. The range between *lex arbitri* and *lex loci arbitri* represents conditions under seat theory where the *lex arbitri* is definitely the *lex loci arbitri*. The second range between *lex loci arbitri* and *rules of procedure* represents the possibility that *lex loci arbitri* and *rules of procedure* are the same and the risk of contradiction between them is avoided and impediment to enforcement is also reduced. The third range between *rules of procedure* and *lex arbitri* represents conditions under de-nationalization theory where parties are allowed to choose their preferred procedural rules and *lex*

⁹⁰⁴ About introduction and comments on arbitration laws and other relevant factors of different countries, see generally Wilske/Fox (2009) pp. 383-418

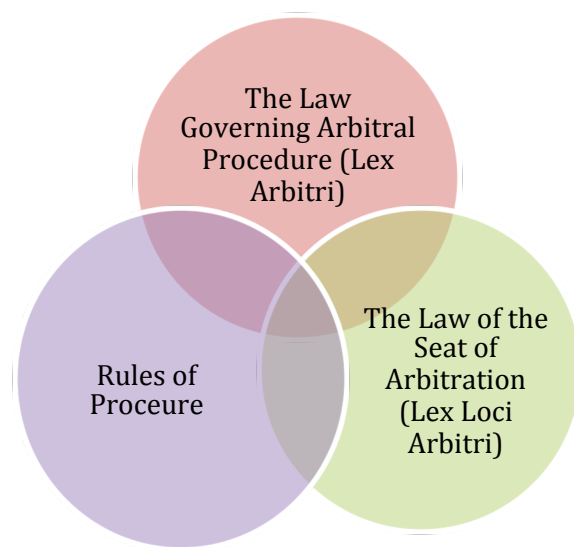
⁹⁰⁵ On how to make a choice-of- forum and choice-of-law decision in arbitration, see Born (2010); Marriott, A. L. (2006) pp.411-429; Nygh, P. E. (1997); Park, W. W. (1995) pp. 99-112

⁹⁰⁶ In one case, a clause read: "Disputes hereunder shall be referred to arbitration, to be carried out by arbitrators named by the International Chamber of Commerce in Geneva in accordance with the arbitration procedure set forth in the Civil Code of Venezuela and in the Civil Code of France, with due regard for the law of the place of arbitration." Craig/Park/Paulsson (1990) § 9.04 at 163. In that clause, the procedural law to be followed was unclear, confused and potentially conflicting, which could lead to challenges to the award.

⁹⁰⁷ English Arbitration Act of 1996, Articles 1(b) and 34(1); New French NCPC of 2011, Article 1509(1); Swiss Private International Law Act of 1989, Article 182(1)

arbitri without the constraint of *lex loci arbitri*. In this case the *lex arbitri* chosen is the same as the procedural rules.

Finally, the centre area in the middle covered by all three circles represents the conditions where both the procedural rules and *lex arbitri* are decided by parties or the tribunal, and the arbitral proceedings are simultaneously governed by the *lex loci arbitri*. This represents the compromised reality for the de-nationalization theory nowadays.



Choosing a *lex arbitri* that is different from the procedural law at the seat complicates matters by forcing the parties and arbitrators to observe another set of rules of law in addition to the law of the seat of the arbitration.⁹⁰⁸ Regardless of the procedural law designated by the parties, the arbitrators will still be obliged to apply the mandatory rules of law of the place of the arbitration,⁹⁰⁹ which may result in conflicts with the designated procedural law, litigation over the resulting issues and enforceability problems.⁹¹⁰ It is also possible, when a different procedural law is specified, that the countries of the

⁹⁰⁸ *Braes of Doune v. Alfred McAlpine* [2008] EWHC 426

⁹⁰⁹ Lionnet (1991) pp. 7-8

⁹¹⁰ *Dubai Islamic Bank PJSC v. Paymentech* [2001] 1 LLR 65

seat and of the procedural law may both assert jurisdiction over the case.⁹¹¹ Such a conflict would be difficult for the parties and the arbitral tribunal to reconcile and would add delay and cost to the fast-track procedure.

Naviera Amazonia Peruana SA v Compania Internacional de Seguros de Peru⁹¹² was an arbitration held in Peru but, by agreement between the parties, was said to be subject to the procedural law of England. During the course of the arbitration it became necessary to have recourse to the courts but problems arose in determining which national court has jurisdiction. The English Court of Appeal noted that although a choice of foreign procedural law was theoretically possible, there were practical difficulties:

*“There is equally no reason in theory which precludes parties to agree that an arbitration shall be held at a place or in country X but subject to the procedural laws of Y. The limits and implications of any such Agreement has been much discussed in the literature, but apart from the decision in the instant case there appears to be no reported case where this has happened. This is not surprising when one considers the complexities and inconveniences which such an agreement would involve. Thus, at any rate under the principles of English law, which rest upon the territorially limited jurisdiction of our courts, an agreement to arbitrate in X subject to English procedural law would not empower our courts to exercise jurisdiction over the arbitration in X.”*⁹¹³

Applying a procedural law different than the seat as *lex arbitri* may also lead to complications over the place where proceedings to set aside the award may be instituted.⁹¹⁴ For example, may an action to annul an award be brought in the country whose procedural law is applied (even though it was not the seat of the arbitration) or in the country of the seat (even though its procedural law

⁹¹¹ *Union of India v. McDonnell Douglas*, (1993) 2 L.R. 48; *National Thermal Power Corp. v. Singer Corp.*, (1992) 3 S.C.C. 551 (India), (1993) XVIII YBCA 403, 413

⁹¹² *Naviera Amazonia Peruana SA v Compania Internacional de Seguros de Peru* [1988] 1 Lloyd's Rep 116 CA

⁹¹³ *Ibid*

⁹¹⁴ Shengehang/Lijun (2006) p.155-183

does not apply) or both?⁹¹⁵ It is essential that each party understands the full implications of agreeing to be bound by the procedural law of another nation. This may require a review of the other country's law with the help of a local lawyer.⁹¹⁶ Considering the importance of speed in FTA, choosing applicable procedural law that supports fast-track procedures will help to reduce any possible confusion.

The options for the drafter in handling the procedural law may be listed as follows:⁹¹⁷

- 1) ignore the issue, which is the most common approach, in which case the arbitrators will decide which procedural rules to apply;
- 2) designate the procedural law of the place of the arbitration;
- 3) specify the procedural law of a country other than that of the seat;
- 4) adopt a procedural law other than that of a country, such as the UNCITRAL Model Law on International Commercial Arbitration;
- 5) exclude a procedural law and create the procedural rules in the arbitration clause itself.

If parties fail to reach an agreement on procedure, the arbitral tribunal is usually given the authority to determine the procedural rules in the manner it considers appropriate according to the circumstances of the case and the specialty and experience of the arbitrators.⁹¹⁸

⁹¹⁵ International Standard Elec. Corp. v. Bidas Sociedad Anonima Petrolera Industrial y Comercial, 745 F. Supp. 172, 176-78 (S.D.N.Y. 1990).

⁹¹⁶ Born, G. (2010) p.94; Zuberbühler/Muller/Habegger (2005) pp.351-362; Friedland (2007)

⁹¹⁷ See Craig/Park/Paulsson (1990) § 8.02 p. 133-134.

⁹¹⁸ Rau/Sherman (1995) p.97

4.5 Procedural Elements of FTA

Although the FTA rules of the major international arbitration institutions all provide specific sets of rules for advanced speed and economy in the organisation of fast-track procedures, it should not be assumed that the rules are all alike.⁹¹⁹ There are, in fact, a number of differences, such as the time limits and procedural shortcuts applied, that can have a great deal of significance for a particular cases.⁹²⁰

Compared with the SCC Expedited Rules, for example, the ICC rules are less specific. The SCC expedited rules provide that during the initial stages the parties must file statements in support of their claims. The ICC rules provide for the preparation and agreement of the parties on the terms of reference. Unlike the SCC Expedited Rules, the ICC must approve any award by the arbitrators, including fast-track arbitral awards.

4.5.1 Commencing Fast-track Arbitration

Valid commencement of FTA proceedings has significant legal consequences, the most important of which is to record the beginning of time limits. Thus, FTA rules,⁹²¹ regular arbitration rules⁹²² as well as some national arbitration laws,⁹²³ provide certain requirements that a request for arbitration needs to fulfil in order to qualify as a trigger for the commencement of arbitral

⁹¹⁹ Bredow, J. (2010)

⁹²⁰ Craig (1985) p.64 “These procedures are characterized not only generally by flexibility but more particularly by the combining of the civil law practice of exchanging documents and written arguments and the common law practice of permitting examination and cross-examination of witnesses.”

⁹²¹ ACICA FTA Rules, Article 5; CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 4; FCC FTA Rules, Article 4; KLRCA FTA Rules Article 3; SCC FTA Rules Article 4; WIPO FTA Rules, Articles 6-13

⁹²² ICC Rules, Articles 4-10; LCIA Rules, Article 1; AAA/ICDR International Arbitration Rules of 2009, Article 2; SCAI Rules, Article 3; DIS SREP, Section 6; CIETAC Rules, Article 11; SIAC Arbitration Rules of 2012, Article 3; UNCITRAL Rules, Article 3

⁹²³ English Arbitration Act of 1996, Section 14; Belgian Arbitration Act of 1998, Section 1683; German Arbitration Law of 1998, Section 1044; which, although based on the UNCITRAL Model Law Article 21, stipulates further specific requirements the request for arbitration must comply with. See Rützel/Wegen/Wilske (2005) p.131

proceedings.⁹²⁴ Though almost all arbitration rules and national laws require some kind of filing to initiate proceedings, only fast-track procedures are expedited even at this early stage.

4.5.1.1 Mode of Commencement

Depending on the specific requirements of the FTA agreement and the applicable laws, the arbitral proceedings may be commenced by:

- Issuing a notice to the opposing party;⁹²⁵
- Issuing a notice to the arbitral institution to submit the dispute to FTA;⁹²⁶
- commencing the procedure for appointment of the arbitral tribunal as provided in the arbitration agreement by, for example, writing to the appointing authority to make the appointment of the arbitral tribunal;⁹²⁷
- lodging the claim with the arbitral tribunal if it is designated in the arbitration agreement.⁹²⁸

4.5.1.2 Request for FTA

An FTA commences with a filing of the demand to the respondent⁹²⁹ or, in the case of institutional arbitration, the receipt for the filing of FTA by the institution.⁹³⁰ Such filings might be referred to as a “notice,” “request” or “statement of claim.” The term “request for FTA” refers to the document intended to first initiate the fast-track proceedings in whatever form. Prior to that, in most cases some sort of attempt at negotiating a settlement will have

⁹²⁴ Lefèvre (2005)

⁹²⁵ KLRCA FTA Rules, Article 3(2)(e)

⁹²⁶ SCC Expedited Arbitration Rules of 2010, Article 4; ACICA FTA Rules, Article 5

⁹²⁷ CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 4; UNCITRAL Rules Article 3(4)(a)

⁹²⁸ Sachs (2010) p. 1055

⁹²⁹ UNCITRAL Rules, Article 3(2)

⁹³⁰ ACICA FTA Rules, Article 5; FCC FTA Rules, Article 4; SCC FTA Rules, Article 4; WIPO FTA Rules, Articles 6-13; ICC Rules Article 4(2); LCIA Rules Article 1(2); AAA/ICDR International Arbitration Rules (2009), Article 2(2)

taken place or the plaintiff will have done the necessary research into the matter and will have prepared his request but it is with the submission of request for FTA that fast-track procedures officially commence.⁹³¹

Under most FTA rules,⁹³² the request for FTA has to contain information about the parties, the arbitration agreement, any procedural arrangements already made between the parties or proposed by the claimant, the registration fee (in case of institutional arbitration), the relief sought, and an initial statement of the claim which is usually rather cursory. FCC FTA Rules only require “*a preliminary statement of the claimant’s claim*” at this stage.⁹³³ The arbitrator will request the claimant to submit a full statement of claim within a specified time.⁹³⁴

Similarly, under the FTA Rules of the SCC, ACICA and KLRCA, only “*a brief summary of the dispute is required*” in the request for FTA but a detailed statement of claim can optionally be submitted in the request for arbitration without the need to wait for an order from the arbitral tribunal.⁹³⁵ A similar system is established by the LCIA Rules in Art. 1.1 (c) and Art. 15.2.

In the 2012 version of ICC Rules the claimant may submit such other documents or information with the Request as it considers appropriate or as may contribute to the efficient resolution of the dispute.⁹³⁶ Despite being a specific set of FTA Rules, the 2004 FCC FTA rules do not permit the submission of a full statement of claim with the request for FTA.

⁹³¹ Uhle/Kirchhoff/Scherer (2006) p.72

⁹³² ACICA FTA Rules, Articles 5; CPR Global Rules for Accelerated Commercial Arbitration of 2009 Article 4; FCC FTA Rules, Article 4; KLRCA FTA Rules Article 3; SCC FTA Rules, Article 4; WIPO FTA Rules, Articles 6-13

⁹³³ FCC FTA Rules, Article 1

⁹³⁴ FCC FTA Rules, Article 17

⁹³⁵ ACICA FTA Rules, Article 5(3)(g); KLRCA FTA Rules, Article 3(2)(g); SCC FTA Rules, Article 4

⁹³⁶ ICC Rules, Article 4(3)

4.5.1.3 Answer to the Request for Arbitration

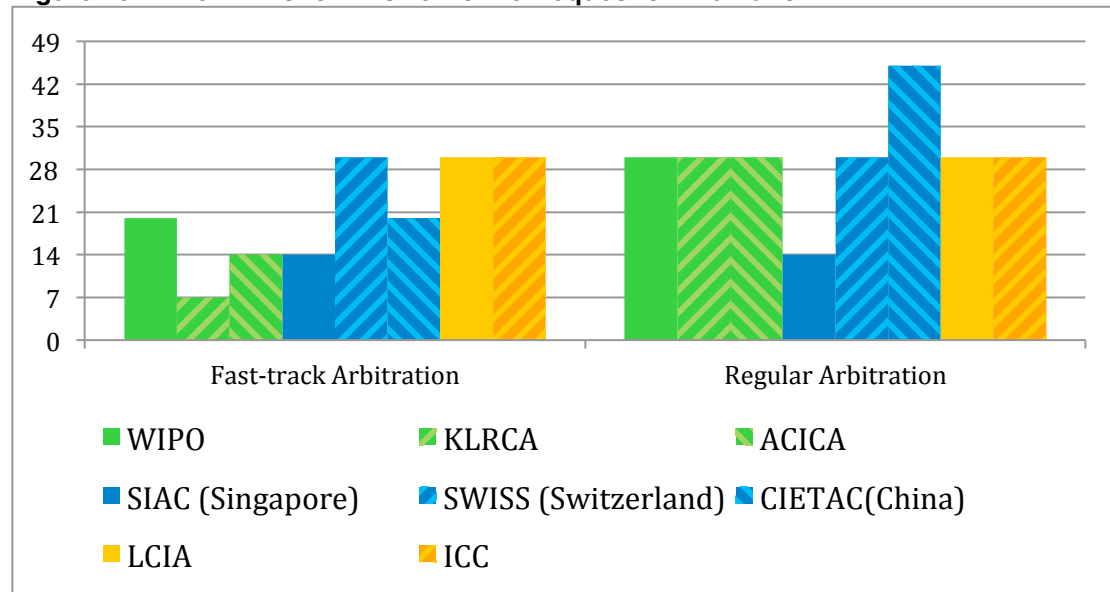
Almost all opt-in FTA Rules impose a short deadline for the Respondent's Answer after the receipt of the Request, or the commencement of arbitration, whichever is later.⁹³⁷ The WIPO FTA Rules require respondents to submit an answer and statement of defence within 20 days of the receipt of the arbitral request, instead of the usual 30 days required by Regular Arbitration. Under ACICA and KLRCA FTA rules an answer is required within 7 days but 28 days is allowed for the submission of the statement of defence.

Under opt-out FTA Rules respondents have the same amount of time to file a response to a request for arbitration as they do under regular Arbitration Rules: 15 days under the AAA and the SIAC (with one seven day extension being possible under the AAA), 30 days under the SCAI and the HKIAC. But all these institutions have the power to shorten this period.⁹³⁸ Only CIETAC among opt-out FTA rules imposes a shorter time limit of 20 day to provide an answer compared to 45 days stipulated in its regular arbitration rules. Notably, however, CIETAC lacks the power to shorten any time limits in the rules.

⁹³⁷ WIPO FTA Rules, Article 11; 20 days rather than 30 days in WIPO Arbitration Rules, Article 11; KLRCA FTA Rules, Article 4; (7 days rather than 30 days in KLRCA Arbitration Rules of 2010, Article 4)

⁹³⁸ AAA Rules, Articles E1 and R4 See also AAA/ICDR International Arbitration Rules of 2009, Article 3 (The ICDR International Arbitration Rules provide for 30 days for a statement of defence.)

Figure 16: Time Limits for Answer to the Request of Arbitration



Source: Institutional Arbitration Rules

Since the time-limits imposed on the respondent tend to be rather short, extensions are frequently granted by arbitral institutions, particularly, if the answer is not expected to be a brief statement of the case.

4.5.1.4 Limitation period for the commencement of FTA

Under most institutional FTA Rules there is no time limit after a dispute has arisen for the valid commencement of FTA. Exceptions are the industry specific institutional rules of the Grain and Feed Trade Association (GAFTA) and the Federation of Oils, Seeds and Fats Association (FOSFA) where commodity disputes are often resolved within very short periods.⁹³⁹

If no institutional rules have been agreed it may be necessary to look at the law of the contract as well as the law of the place of the arbitration to see whether there is any limitation period for commencing FTA. As expected, different national laws have different time limits.

⁹³⁹ GAFTA and FOSFA prescribe different time limits commencing arbitration in respect of disputes arising out of "Rye Terms", CIF, CIFFO, C&F and FOB contracts. The most common time limit is that, in the case of CIF, FOB, CIFFO and C&F contracts, the arbitration must be initiated not later than one year after the expiry of the contract period of shipping under GAFTA Rule 125 while this is 120 days according to Article 2 of the current FOSFA Rules.

4.5.1.5 Communication and Calculation of Time

Almost all arbitration rules clearly prescribe the form and means of delivery of any notice or other communication referred to in the Arbitration Rules. This both ensures expeditious delivery of the notices and provides a record of their delivery. Such rules also remove a possibly problematic discrepancy between the date arbitration proceedings would be regarded as having commenced under the applicable law, and the date such proceedings would be regarded as having commenced under the arbitration agreement.

Delivery by ordinary mail often not a permissible means of delivery under fast-track procedures. Most FTA Rules allow notice of the initiation of the arbitration to be served by fax, email or any other means of electronic transmission. KLRCA FTA Rules, for instance, allow the claimant to directly submit the Notice of Arbitration to the respondent rather than requiring the centre to send it.⁹⁴⁰ Arbitration is thus commenced on the date when the party initiating the arbitration delivers to the other party a notice in writing stating its intention to commence a fast-track arbitration⁹⁴¹ Article 4 of the FCC FTA Rules similarly accepts a party's notice to the other party as the date for the commencement of arbitration providing a copy of the notice of arbitration has been sent to the institution. Any expedited means of communication is acceptable as long as it can provide a record of the attempted delivery. The AAA Rules offer perhaps the most unorthodox time-saving approach by permitting the notice of the initiation of the arbitration to be served by telephone, so long as it is followed by written notice.⁹⁴²

Although using a postal or courier service is not normally preferable in FTA, a notice is deemed received on the day it is "delivered," *i.e.*, when it arrives at its destination.⁹⁴³ The reference to delivery rather than receipt is useful because it covers the situation in which the notice is delivered but the

⁹⁴⁰ KLRCA FTA Rules, Article 2

⁹⁴¹ KLRCA FTA Rules, Article 3(1)

⁹⁴² AAA Rules, Article E3

⁹⁴³ WIPO FTA Rules, Article 4(c); ACICA FTA Rules, Article 4(1); KLRCA FTA Rules, Article 2(3)

addressee party is not there to receive it.⁹⁴⁴ If the notice is communicated electronically it is deemed to have been received on the day it was transmitted.⁹⁴⁵ Of course, parties may seek to use this provision to their advantage by timing electronic transmissions to take advantage of the differences in time zones which are frequently a feature of international arbitration.⁹⁴⁶

Almost all FTA Rules, like those of UNCITRAL, ICC and LCIA, stipulate that periods of time begin to run on the day following receipt of notice, regardless of whether the day of receipt or the following day is a holiday at the place where notice is received.⁹⁴⁷ Thus mean-spirited parties will undoubtedly be tempted to time their submissions to fall on holidays. All other major arbitration institution rules, extend any deadline that falls on an official holiday or non-business day until the first business day which follows.⁹⁴⁸ Rules differ, however, as to whether the holiday must be at the residence or place of business of the addressee or at the place the notice is received. Rules opt for the residence or place of business of the addressee.⁹⁴⁹ Opting for the place where the notice is received might be preferable in the event that the addressee does not reside where the notice is deemed effective. Because the dates for public holidays change significantly from one country to another article 4(3) of the ACICA FTA Rules states: *“Unless the parties agree otherwise in writing any reference to time shall be deemed to be a reference to the time at the seat of the arbitration.”*⁹⁵⁰ Like all arbitration rules, FTA

⁹⁴⁴ Another way to cover the situation is simply to provide that the notice is effective on the day it is received or deemed received. See, e.g., SCC FTA Rules, Article 8(3) (A notice or communication sent in accordance with paragraph (2) shall be deemed to have been received by the addressee on the date it would normally have been received given the chosen means of communication.); Also ICC Rules, Article 3(3)

⁹⁴⁵ KLRCA FTA Rules, Article 2(4); WIPO FTA Rules, Article 4(c);

⁹⁴⁶ Wegen/Wilske (2004) p.205-209

⁹⁴⁷ WIPO FTA Rules, Article 4(d); KLRCA FTA Rules, Article 2(3); ACICA FTA Rules, Article 4(2)

⁹⁴⁸ WIPO FTA Rules, Article 4(e); KLRCA FTA Rules, Article 5(2); ACICA FTA Rules, Article 4(2)

⁹⁴⁹ ACICA FTA Rules, Article 4(3); CPR Global Rules for Accelerated Commercial Arbitration of 2009 Article 3.2

⁹⁵⁰ ACICA FTA Rules, Article 4(2); CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 3.1

Rules, provide that official holidays or non-business days occurring during the prescribed periods of time are included in calculating the period.⁹⁵¹

4.5.1.6 The Role of Arbitral Institutions in assisting parties

Increasingly, parties look to their chosen arbitral institution not just to apply its FTA rules, but also to provide guidance and assistance in connection with the drafting of arbitration agreements, advice on the requirements of local arbitration legislation or jurisprudence and assistance in resolving difficulties between the parties in setting the fast-track arbitration procedure in motion.⁹⁵² In an attempt to speed up the arbitral proceedings, arbitral institutions may therefore get involved in administering the fast-track case long before the Request for Arbitration is received and arbitration officially commences.⁹⁵³

The preliminary steps taken by the parties and the arbitral institution at the outset of the FTA proceedings may include some or all of the following:

- (a) a preliminary meeting between the parties and the arbitral institution to discuss the organization of the FTA proceedings;
- (b) a determination of any preliminary issues, such as cost, advance fees, correspondent between parties, and expeditious appointment of arbitral tribunal;⁹⁵⁴
- (c) a discussion of the effectiveness of different expedited remedies, such as pre-arbitral referee procedures, interim measures and 'fast-track' arbitrations.⁹⁵⁵

⁹⁵¹ ICC Rules, Article 3(4); LCIA Rules, Article 4(6); AAA/ICDR International Arbitration Rules of 2009, Article 18 (2)

⁹⁵² Schwartz (1995) p.155

⁹⁵³ SCC FTA Rules, Article 4; WIPO FTA Rules, Article 7; ACICA FTA Rules, Article 5(2); HKIAC Rules, Article 4(2); FCC FTA Rules, Article 4; SCAI Rules, Article 3(2)

⁹⁵⁴ Final Report on the Status of the Arbitrator (1996) *ICC Bulletin*, 7(1) p. 27

⁹⁵⁵ Jenkins/Stebbing (2006) p. 167

As a general rule, neither the institution's rules nor national laws grant the arbitral institution any specific powers in respect of these preliminary steps.⁹⁵⁶ However, the arbitral institutions have a duty to conduct the proceedings diligently and expeditiously before the arbitral tribunal, and such preliminary steps are a key means of preparing parties for a fast-track arbitration.⁹⁵⁷

4.5.2 Constitution of the Arbitral Tribunal

The appointment of arbitrators is one of the most important considerations in the conduct of FTA.⁹⁵⁸ Indeed, a leading principle in any arbitration is that the arbitration is no better than the arbitrator.⁹⁵⁹

FTA Rules generally include a number of specific provisions in relation to the expedited appointment of the arbitral tribunal.⁹⁶⁰ Ideally, the parties are expected to appoint the arbitral tribunal within short time limits after the request of arbitration. Where the arbitration agreement calls for the nomination of party-appointed arbitrators, the claimant is usually required to present his nomination together with the request for arbitration.⁹⁶¹ There is also a time limit for parties to jointly appoint sole or third arbitrators.⁹⁶² However, if the parties fail to agree on the name of arbitrator within the prescribed time there will be no time extension and instead the institution will make the appointment.

⁹⁵⁶ Overcash (2011)

⁹⁵⁷ Webster (2003) p. 119

⁹⁵⁸ Park (2009) p. 644

⁹⁵⁹ Lord Hacking (2000) p. 32-37

⁹⁶⁰ SCC FTA Rules, Article 13; WIPO FTA Rules, Article 14; ACICA FTA Rules, Article 8; HKIAC Rules, Article 7; FCC FTA Rules, Article 11; SCAI Rules, Article 7

⁹⁶¹ KLRC A FTA Rules, Article 3(2)(e); ICC Rules, Article 12(4); LCIA Rules, Article, 1(1) (e); UNCITRAL Arbitration Rules (2010), Article 3(4)(c) this is optional.

⁹⁶² See supra fn. 960

4.5.2.1 Sole Arbitrator

Unless the parties agree otherwise, the default position under all fast-track rules is that a sole arbitrator will decide the arbitration.⁹⁶³ This contrasts with the three arbitrators normally appointed under the regular arbitration rules of the CIETAC⁹⁶⁴, the KLRCA⁹⁶⁵, the DIS⁹⁶⁶ and the UNCITRAL.⁹⁶⁷

Obviously, there are fewer scheduling problems to overcome with a single arbitrator.⁹⁶⁸ According to Smit the use of a sole arbitrator will avoid at least three types of delay inherent in using three-member tribunals:⁹⁶⁹

- 1) delays in the constitution of a three-member tribunal, in which each party is allocated time to designate an arbitrator and the two party-appointed arbitrators then have additional time to designate the chair;
- 2) delays entailed by the need to coordinate the schedules of three arbitrators often located in different parts of the world;
- 3) delays entailed by debate among the members of the tribunal as to procedural and substantive issues. Thus, with no other members of the tribunal to consult, a sole arbitrator is in a position to start drafting his or her award shortly after the closing of the proceedings.⁹⁷⁰

⁹⁶³ KLRCA FTA Rules, Article 4; SCC FTA Rules, Article 1 and WIPO FTA Rules, Article 14; ACICA FTA Rules, Article 8

⁹⁶⁴ CIETAC Rules, Article 23 (1)

⁹⁶⁵ KLRCA Arbitration Rules of 2010, Article 7; KLRCA FTA Rules, Article 4. any arbitration conducted under these Rules *shall be conducted by a sole arbitrator* See ACICA Arbitration Rules of 2011, Article 8; ACICA FTA Rules, Article 8 (There shall be one arbitrator.)

⁹⁶⁶ DIS SREP, Section 3

⁹⁶⁷ UNCITRAL Rules, Article 7

⁹⁶⁸ Cook/Garcia (2010) p.216

⁹⁶⁹ Smit (1998) p.36

⁹⁷⁰ Cook/Garcia (2010) p.217

The problem of choosing a sole arbitrator is that each party must be confident that the arbitrator they agree to will not favour the other.⁹⁷¹ This may lead to a time consuming search for a sole arbitrator with superb credentials who demonstrates not only efficiency but also scrupulous fairness and level playing field.⁹⁷² This means talking to other users of international arbitration to find out about their experiences and to other international arbitrators to find out whether a proposed sole arbitrator has a reputation for managing the process expeditiously and fairly.⁹⁷³

However, it is easier to vet one arbitrator's reputation, professional background, case management style and expertise than it is to engage in this process three times over.⁹⁷⁴

The qualifications of the sole arbitrator may be designated in the FTA Agreement.⁹⁷⁵ For example, it may be provided that the sole arbitrator should be an engineer or a lawyer of "*not less than five years standing*" or a "*commercial man*".⁹⁷⁶ However, this may cause delay in ascertaining whether or not a particular arbitrator possesses the relevant qualifications during the selection process. In any event, it is easier to define the type of arbitrator and qualifications required for a sole arbitrator compared to a three-members tribunal.⁹⁷⁷

If parties and counsel trust a sole arbitral tribunal to be fair and able, then it makes sense to use him and forgo the three-member panel.⁹⁷⁸ By this simple act, parties not only speed their dispute but they can also reduce their arbitrator costs by two-thirds.⁹⁷⁹ However, according to Paulsson, this cost benefit may be elusive: the fees payable to the sole arbitrator in FTA may be

⁹⁷¹ Tawil/Montashami/Sheppard (2009)

⁹⁷² Reed (2010)

⁹⁷³ Lord Hacking (1998)

⁹⁷⁴ Welser/Klausegger (2009)

⁹⁷⁵ Werner (1998) p. 22

⁹⁷⁶ *Ibid*

⁹⁷⁷ Megens/Cubitt (2010)

⁹⁷⁸ Carter (2011) p. 4-9

⁹⁷⁹ Holt (2003)

no less than those payable in ordinary arbitration.⁹⁸⁰ Indeed, it may be that FTA proceedings are so intensive that the arbitrators' ordinary work schedule is disrupted and this may justify fixing the sole arbitrator's fee at a higher level within the *ad valorem* range.⁹⁸¹ Therefore, using one arbitrator rather than three may not always lower costs.⁹⁸²

The role of a sole arbitrator is certainly more demanding and involves more responsibility on his part because he must do the work of the chairperson and the co-arbitrators of a three-members tribunal.⁹⁸³ One of his main tasks is to carefully plan the FTA proceedings in order to secure the speed and economy of the process.⁹⁸⁴ As a general rule, he needs to possess experience, preferably in the form of having previously served as a sole arbitrator or chairman of arbitral tribunals. The importance of being able to smoothly handle and administer hearings, the exchange of written submissions between the parties and observing the obedience of shorter deadlines should not be underestimated.⁹⁸⁵

But should the court-appointed three-member arbitral tribunal be precluded in all cases, even in circumstances where a sole arbitrator might be inappropriate? The question arose in *Villa Denizcilik Sanayi ve Ticaret AS v. Longen SA*.⁹⁸⁶ The respondent argued that the nature and complexity of the dispute warranted a three-member tribunal and relied on the overriding principle, section 1 of the Act, that arbitration should be fair and free of unnecessary delay or expense.

Mance J., held that only a sole arbitrator could be appointed. Moreover, if it had jurisdiction to decide the number of arbitrators, the court considered itself

⁹⁸⁰ Paulsson (1994) p. 716 n.6.

⁹⁸¹ *Ibid*

⁹⁸² Expedited Arbitration Rules: Stockholm and WIPO, 13 Arb Int'l Vol. 13(2) (1997) pp. 193

⁹⁸³ Herrmann (2001) p. 71-79

⁹⁸⁴ Rivkin (2008) p. 380

⁹⁸⁵ UNCITRAL Model Law, Article 10(2); Austrian Arbitration Act of 2006, Art 586(1); German Arbitration Act of 1998, Article 1034(1)

⁹⁸⁶ ("The Villa") [1998] 1 Lloyd's Rep. 195.[1999] 2 Lloyd's Rep. 159 p. 162

bound by the parties' "*implicit provision*"⁹⁸⁷ of a sole arbitrator which arose from the default provisions of the English Arbitration Act.⁹⁸⁸

In similar vein, the English Court of Appeal recently decided, *obiter dicta*, that the failure of parties to specify the number of arbitrators in an arbitration agreement will lead to the appointment of a sole arbitrator, even if the arbitration agreement contemplates more than one arbitrator.⁹⁸⁹

4.5.2.2 Three Members Tribunal

In FTA, the default rule is to appoint a sole arbitrator. However, it is not unusual in international commercial arbitrations for the fast-track disputes to be referred to a three-members arbitral tribunal by the parties' agreement.⁹⁹⁰ Where the arbitral tribunal consists of three arbitrators, each of the parties will usually have the right to nominate one arbitrator, leaving the third arbitrator to be chosen in some other manner.⁹⁹¹ The 2012 SIA/WC Survey reported that a significant majority of respondents (76%) prefer selection of the two co-arbitrators in a three-member tribunal by each party unilaterally.⁹⁹²

⁹⁸⁷ *Ibid* p.167

⁹⁸⁸ English Arbitration Act of 1996 Sections 15 and 18

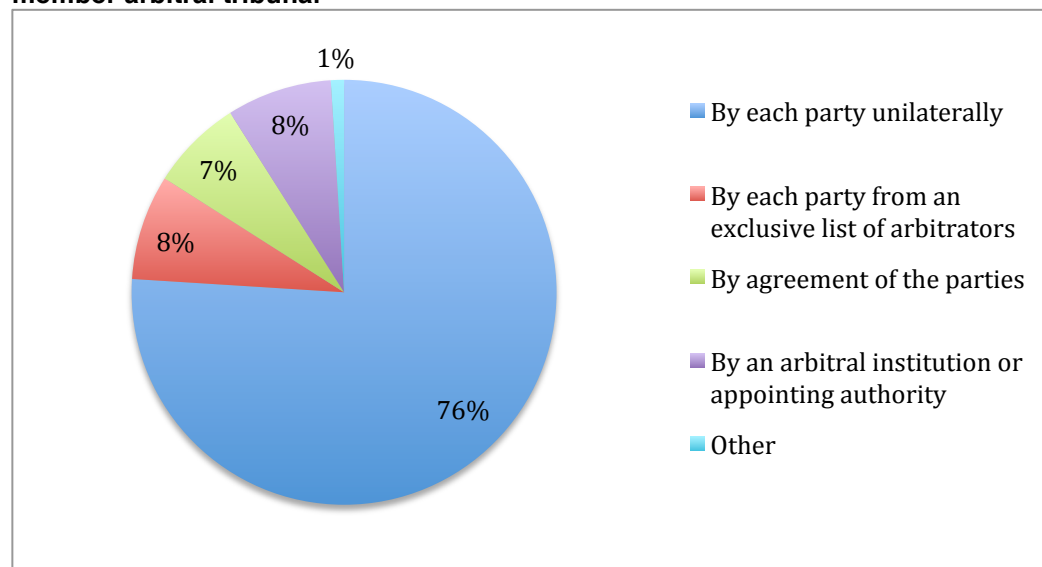
⁹⁸⁹ *Itochu Corp v Johann MK Blumenthal GmbH & Co KG*. [2012] EWCA Civ 996. Burnton LJ; Gross LJ; Maurice Kay LJ. 24 July 2012

⁹⁹⁰ Bridgeman (2010) p. 631

⁹⁹¹ SIA/WC Survey (2012) p. 2

⁹⁹² *Ibid*

Figure 17: By what method do you favour selection of two co-arbitrators in a three-member arbitral tribunal



Source: 2012 SIA/WC Survey p.5

Allowing each party to nominate one of the arbitrators in a three-member panel gives the parties confidence in the arbitral tribunal.⁹⁹³ Each party will have at least one person of choice to listen to their case. This may be important in an international arbitration where there may be differences of language, tradition and culture between the parties and, indeed, between the members of the arbitral tribunal themselves.⁹⁹⁴ An arbitrator nominated by a party may be perceived as being in a position to help in ensuring that his appointer's case is better understood by the arbitral tribunal.⁹⁹⁵ Choosing a sole arbitrator may increase speed but parties lose the important contribution of co-arbitrators in presenting their side of the argument.⁹⁹⁶

Moreover, having a panel of three arbitrators brings more experience, judgment and skill.⁹⁹⁷ Having three heads may be considered better than one, and prevents a "rogue" arbitrator from running off in the wrong direction.⁹⁹⁸ A

⁹⁹³ Secomb/Krause/Nacimiento/Ray/Turrini/Goldberg (2011)

⁹⁹⁴ Paulsson (2010)

⁹⁹⁵ Landau (2007) pp. 282-297

⁹⁹⁶ Webster (2003) p. 132

⁹⁹⁷ Swanton (2007)

⁹⁹⁸ Carter (2011) p.6

panel also may do a better job of assessing credibility, which can be discussed during deliberations.

A three-member tribunal also helps to assuage the doubt regarding the legal security of fast-track procedures⁹⁹⁹ and the ultimate award is more likely to be acceptable to the parties. As Carter observes:

*“While some think three-arbitrator tribunals are more likely to compromise than sole arbitrators, in our view a panel of active arbitrators is, in general and all other things being equal, more likely to get it right than a single arbitrator - three minds are better than one. Given the virtual absence of appeals on the merits, this is an important safeguard.”*¹⁰⁰⁰

Since there are many advantages of selecting a three-member arbitral tribunal, FTA rules do not entirely eliminate this possibility.¹⁰⁰¹ There is no prohibition against appointing a three-member arbitral tribunal in FTA if this is stated in the arbitration agreement.¹⁰⁰² Thus, Article 4(3) of the KLRCA FTA Rules is devoted to matters if the Arbitral Tribunal is to consist of three arbitrators. Similarly, according to the DIS SREP Rules, parties may agree to a three-member arbitral tribunal prior to the filing of the statement of claim.¹⁰⁰³ If a three-member arbitral tribunal is appointed it is important to keep any delays in constituting the tribunal to a minimum. This might be achieved by maintaining a deadline for the parties to appoint the co-arbitrators and also a deadline for selection of on the chairman.

⁹⁹⁹ Paulsson (1994) pp. 715-16 (noting the "marginal reduction in legal security for greater speed at lower costs" associated with expedited arbitration by a sole arbitrator).

¹⁰⁰⁰ Carter (2011) p. 9

¹⁰⁰¹ The CCIG Expedited Procedure of 1991 and IAMA Fast-track Arbitration Rules of 2007 do not require a sole arbitrator as a default rule. See also Downie (1991) pp. 482-84 (recommending the use of three arbitrators, unless the parties agree otherwise, to conduct fast-track arbitration). Furthermore, ICC FTA Cases No 7385 and 7402 was conducted by a tribunal of three arbitrators. See Smit (1991) p. 138

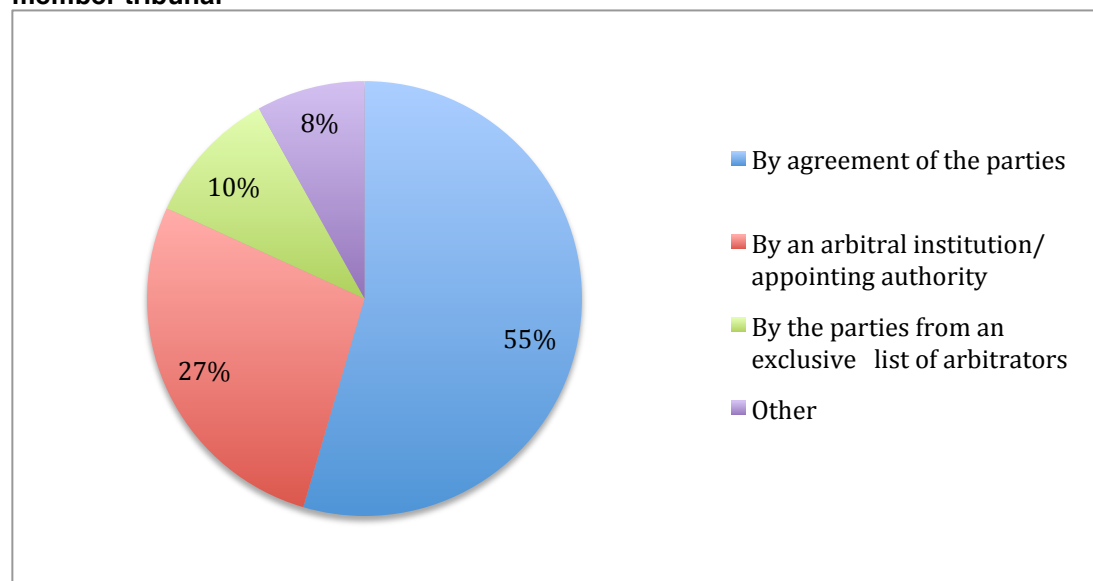
¹⁰⁰² See *i.e.* restrictive language used in the FCC FTA Rules, Article 11 “If the parties have agreed on arbitration under these rules, the dispute shall be resolved by one arbitrator appointed by the Arbitration Institute of the Finland Chamber of Commerce.”

¹⁰⁰³ DIS SREP, Art 3(1)(parties may decide on three arbitrators rather than a sole arbitrator prior to the filling of the statement of claim)

4.5.2.3 Method of Appointing the Tribunal

The 2012 SIA/WC survey shows that the majority of respondents prefer the selection of the sole arbitrator or the chair in a three-member tribunal to be by agreement of the parties.¹⁰⁰⁴ The next favoured method is appointment by an arbitral institution or appointing authority. A few respondents prefer selection by the parties from an exclusive list of arbitrators which is a method often used by the AAA.¹⁰⁰⁵

Figure 18: Preferred method for selecting a sole arbitrator or the chair in a three-member tribunal



Source: 2012 SIA/WC Survey p.6

4.5.2.3.1 Appointment of the tribunal by the parties

The process of constituting the arbitral tribunal may take a considerable amount of time in regular arbitral proceedings, especially if the parties cannot agree on the number of arbitrators and the length of time required for their appointment.¹⁰⁰⁶ To increase speed, the parties often specify in the FTA agreement the number of arbitrators to be used and the method for their

¹⁰⁰⁴ SIA/WC Survey 2012 p. 6

¹⁰⁰⁵ Lord Hacking (2000) p. 35

¹⁰⁰⁶ Borris (2008) p.296

appointment.¹⁰⁰⁷ In the absence of such a provision, most FTA rules prescribe a specific time period for parties to name the sole arbitrator or the chair in a three-member arbitral tribunal.¹⁰⁰⁸

However, there is no fixed rule or practice as to how the parties should proceed to reach such an agreement expeditiously without the need for institutions to step in after shortened time limits.¹⁰⁰⁹ It is not uncommon for the parties to consult each other and perhaps for each party to exchange lists of a few possible arbitrators with a description of the experience and qualifications of each of them.¹⁰¹⁰ It sometimes happens that the same person is on both lists. The persons so proposed and ultimately the person so chosen must consent to the appointment.¹⁰¹¹ A written confirmation of that person's consent should be obtained. In some jurisdictions, it is a statutory requirement that the acceptance of the appointment should be in writing.¹⁰¹²

Since the parties will be anxious to have a prompt award, a very busy arbitrator should not be selected.¹⁰¹³ Even if the arbitrator is not a "celebrity" arbitrator with a full calendar, the parties should expect delays because of the arbitrator's schedule.¹⁰¹⁴ Thus, parties should be ready to nominate their arbitrator within a few days but it might be that the most suitable candidate for a sole arbitrator position is not available until 3 months later. Should parties wait for him or try a new face? An arbitration clause that urges the arbitral tribunal to issue the award "within three months after appointment of the chairman" or "within six months from the constitution of the arbitral tribunal"

¹⁰⁰⁷ Germany 106. Oberlandesgericht Court of Appeal, Celle, 14 December 2006, no. 8 Sch 14/05 in Albert Jan van den Berg (ed), *Yearbook Commercial Arbitration 2007 - Volume XXXII*, Volume XXXII (Kluwer Law International 2007) pp. 379 – 381 (The claimant has supplied a fax from its insurer, dated 18 May 2004, by which it appoints an arbitrator and requests the respondent to appoint an arbitrator within 14 days.)

¹⁰⁰⁸ See supra p. 199 fn. 960

¹⁰⁰⁹ Lord Hacking (2000) p. 36

¹⁰¹⁰ *Ibid*

¹⁰¹¹ Lalive (1989)

¹⁰¹² Netherlands Arbitration Act of 1986, Art 1029(1).

¹⁰¹³ Ulmer (2010) p. 230

¹⁰¹⁴ Waincymer (2010) p. 25

certainly does not have its full intended effect if the appointment of the chairman or the constitution of the arbitral tribunal takes one year or more.¹⁰¹⁵

Therefore, selection of the arbitrators in the “pre-arbitral phase” should be duly considered.¹⁰¹⁶ Counsel should always ask what sort of arbitrator would suit the client's case. Often the best choice is a legal professional who also has expertise in the subject matter of the dispute. Such a person should be able to quickly understand any difficult legal and factual issues as well as ensuring fast-track procedures.¹⁰¹⁷

4.5.2.3.2 Appointment of the tribunal by an arbitral institution or an appointing authority

Institutions can help the parties by providing a list of qualified arbitrators.¹⁰¹⁸ In order to ensure that arbitrators on their panel are competent, many institutions seek feedback from the parties that use them.¹⁰¹⁹ Institutions will also provide arbitrator training.¹⁰²⁰ The AAA has a training requirement for arbitrator candidates that wish to remain on its panel.

In order to speed up FTA, arbitral institutions, like the SCC, the KLRCA and the ACICA, impose deadlines for the appointment of a sole arbitrator.¹⁰²¹ KLRCA Fast-track Rules stipulate a time limit of 7 days from the commencement of the arbitration in which parties must appoint a sole arbitrator.¹⁰²² If they fail, the director appoints the sole arbitrator, with the notice of either party, within 14 days. Under WIPO FTA Rules the time limit for

¹⁰¹⁵ Sachs (2006) p. 107

¹⁰¹⁶ Sachs (2010) p. 1055

¹⁰¹⁷ Berger (2009) p.218

¹⁰¹⁸ Lord Hacking (2000) p. 37

¹⁰¹⁹ Stipanowich & College of Commercial Arbitrators (2010)

¹⁰²⁰ *Ibid*

¹⁰²¹ ACICA FTA Rules, Article 8.2 (Within 14 days from the commencement of the arbitration) FCC FTA Rules, Article 11

¹⁰²² 2012 KLRCA Fast-track Rules Article 4

parties to appoint a sole arbitrator is 15 days and under SCC FTA Rules 10 days.¹⁰²³

However, if one of the parties is unwilling to agree on the appointment of the arbitrators, or it is otherwise certain that the parties will not be able to agree, it is unclear whether a party may request the arbitral institution to appoint the arbitrators forthwith, without waiting for the time limit to expire.¹⁰²⁴ It would appear preferable, particularly in an FTA context, not to require that the time period expire before the institution will appoint an arbitrator.¹⁰²⁵ To reduce such confusion ACICA Fast-track Rules stipulate a time limit of 14 days from the commencement of the arbitration for the institutional appointment.¹⁰²⁶ Within this time-limit the institution consults parties for their mutual appointment otherwise it makes the appointment.¹⁰²⁷ FCC FTA Rules also direct the institution to make the appointment as soon as possible after the commencement of arbitration without giving parties a specific time limit for their own appointment.¹⁰²⁸

Under the CPR Expedited Rules, parties may agree to a time limit for the appointment of a sole arbitrator in the arbitration clause. If they are unable to come to an agreement within that time the CPR appoints the sole arbitrator; if no time limit is included in the arbitration clause, the CPR establishes a time period for parties to make an appointment. On the request of any party, the CPR shall appoint the sole arbitrator and otherwise make an appointment upon the expiry of the time limit.¹⁰²⁹

Under CIETAC rules, there is no separate fast-track arbitrator appointment mechanism as the task is adequately covered by the general provisions. Parties are allowed 15 days from the date of the Respondent's receipt of the

¹⁰²³ SCC FTA Rules, Article 13; WIPO FTA Rules, Article 14

¹⁰²⁴ Smit (1998) p. 32

¹⁰²⁵ Note on Expedited ICC Arbitration Procedure of 2002

¹⁰²⁶ ACICA FTA Rules, Article 8

¹⁰²⁷ Magnusson (2001)

¹⁰²⁸ FCC FTA Rules, Article 11

¹⁰²⁹ CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 6

Notice of Arbitration to jointly nominate the sole arbitrator, or entrust the Chairman of CIETAC to make an appointment from the list of arbitrators.¹⁰³⁰ Under these rules there is no time limit for the Chairman of CIETAC to appoint the sole arbitrator.¹⁰³¹ It is presumed that the chairman will act expeditiously once parties fail to appoint their arbitrators.

Most opt-out FTA Rules refer to their general provisions for the formation of the arbitral tribunal but this is not as expeditious as using specific FTA rules. Under the HKIAC parties are given 30 days to jointly appoint the sole arbitrator but article 38(2)(1) states that the HKIAC Secretariat “*may shorten the time limits for the appointment of arbitrators.*”¹⁰³² Similarly, the SIAC Expedited Rules in Article 5 empowers the Register to shorten any time limits under its rules. Normally, if the parties are unable to agree the nomination within 21 days after the receipt of the Notice of Arbitration the Chairman will appoint a sole arbitrator as soon as practicable.¹⁰³³

While many arbitral institutions use their own discretion to quickly appoint arbitrators, some arbitral institutions provide parties with a short list from which they can cross out the arbitrators until one is left.¹⁰³⁴ Under the AAA, for instance, when FTA is initiated the institution prepares a list of five arbitrators from its commercial arbitrator list. Parties may agree to an arbitrator from this list or, if they cannot agree, strike out two names and submit their shortened lists to the AAA, which will make the final selection.¹⁰³⁵

However, in international commercial cases it is still increasingly common for the selection and appointment of arbitrators to take four months or more to complete.¹⁰³⁶

¹⁰³⁰ CIETAC Rules, Article 25

¹⁰³¹ *Ibid*

¹⁰³² HKIAC Rules, Articles 38 for the expedited procedures and Articles 7.1, 7.2 and 8.2 for the formation of arbitral tribunal.

¹⁰³³ SIAC Rules, Articles 7(1) and 7(2)

¹⁰³⁴ Stipanowich/Kaskell (2001) p. 89

¹⁰³⁵ AAA Rules E-5

¹⁰³⁶ Bühring-Uhle/Kirchhoff/Scherer (2006) p.108

Where the parties have adopted UNCITRAL Rules, Articles 6 and 7 provide that the Secretary-General of the Permanent Court of Arbitration at The Hague may designate an authority to appoint the arbitrator if no appointing authority has been agreed upon by the parties but the process may takes up to 90 days to conclude.

Similarly, ICC Rules provide that if parties fail to nominate a sole arbitrator within 30 days from the date on which the Claimant's Request for Arbitration was received by the other party, the ICC Court will appoint the sole arbitrator.

The ICC Court does not make the selection itself but delegates this task to a national ICC committee.¹⁰³⁷ The arbitrator so selected must then be confirmed by the ICC Court. This method has been criticized for its inherent delays. Sources of delay in this process can be the parties who ask for extensions for the nominations of a party-appointed arbitrator,¹⁰³⁸ the national committees which may exceed the time-limit set by the ICC, and the ICC Court itself which may reject the national committee's proposal.¹⁰³⁹ The average time for the constitution of the arbitral tribunal is estimated at 3-6 months but can on occasions be significantly longer.¹⁰⁴⁰ One of the attorneys interviewed recounted an ICC arbitration where the constitution of the tribunal took over a year.

In order to speed things up, Art. 32 of 1998 ICC Rules authorizes the parties to agree to shorten the various time limits set out in the Rules. However, since Art. 32 requires parties to modify the time limits in the arbitration clause before the dispute has arisen, in practice not much acceleration has been achieved under this rule as parties rarely change the model ICC Arbitration clause.

¹⁰³⁷ ICC Rules, Article 9(3)

¹⁰³⁸ Ulmer (1991) pp. 41-42

¹⁰³⁹ Where the ICC Court rejects the proposal or where the national committee fails to honor the time limit, the ICC Rules provide that the ICC Court may repeat the request or solicit the proposal of another national committee, ICC Rules, Article 9(3)

¹⁰⁴⁰ Uhle/Kirchhoff/Scherer (2006) p.73

The 2012 ICC Rules have recently resolved the problem by giving the ICC Court the right to make direct appointments in the following cases:

- one or more of the parties is a state or state entity;
- the Court considers that it would be appropriate to appoint an arbitrator from a country or territory where there is no National Committee or Group;
- the president of the Court certifies to the Court that circumstances exist which, in the president's opinion, make a direct appointment necessary and appropriate for arbitrations.¹⁰⁴¹

The latter bullet appears to include fast-track arbitrations in consideration with article 38 of the 2012 ICC Rules which permits parties "*to shorten the various time limits*" set out under the general arbitration rules.¹⁰⁴²

4.5.2.3.3 By the Court

If the agreed mechanism for appointing an arbitrator breaks down, as for example, if the parties are unable to agree upon an arbitrator or have not agreed to the appointment being made by an appointing authority, reliance may have to be placed on the on the *lex arbitri* and application made to the relevant national court for that court to make the appointment.¹⁰⁴³ However, depending on the jurisdiction where the application is made, this procedure can entail significant delays.¹⁰⁴⁴

Where the place of arbitration has been specified in the arbitration agreement, the national courts of that place should have jurisdiction.¹⁰⁴⁵ However, if the place of arbitration has not been specified in the arbitration agreement or

¹⁰⁴¹ ICC Rules, Article 13(4)

¹⁰⁴² ICC Rules, Article 38

¹⁰⁴³ UNCITRAL Model Law Article 11; German Arbitration Law of 1998, Article 1035 (3); Austrian Arbitration Act of 2006, Article 587; Australian International Arbitration Act of 2011, Section 16; English Arbitration Act of 1996, Section 16

¹⁰⁴⁴ Okekeifere (1998) pp. 129-144

¹⁰⁴⁵ See *supra* pp.179-190 section 4.4.7.

otherwise agreed upon by the parties, and the parties have not expressly agreed on which country's laws should govern the arbitration, problems could arise.¹⁰⁴⁶ There could be difficulty in identifying the national court that has, or is willing to assume, jurisdiction over the making of the appointment.¹⁰⁴⁷ If, in those circumstances, there is no court with jurisdiction to make the appointment, the arbitration agreement may be regarded as inoperable.¹⁰⁴⁸

The national court having *prima facie* jurisdiction must also have the powers under its national laws to make the appointment.¹⁰⁴⁹ In jurisdictions with developed arbitration laws, this should not pose a problem. For example, in the countries that have adopted the Model Law as part of their national laws, the national courts (or some other competent authority designated by that country's laws) would be empowered to make the appointment.¹⁰⁵⁰

4.5.2.4 Challenging the appointment of Arbitrators

Once the appointment process has been completed, the parties are expected to be in the hands of the arbitrator. However, an arbitrator may sometimes be challenged on a number of different grounds:

- where circumstances exist that give rise to justifiable doubts as to his impartiality or independence;¹⁰⁵¹
- he does not possess the qualifications required of him as required by the arbitration agreement;¹⁰⁵²
- he is physically or mentally incapable of conducting the proceedings;¹⁰⁵³

¹⁰⁴⁶ *Ibid*

¹⁰⁴⁷ *Shashoua v. Sharma* [2009] EWHC 957 (Comm)

¹⁰⁴⁸ *Nomihold Securities Inc v. Mobile Telesystems Finance SA* [2012] EWHC 130 (Comm). (2012)

¹⁰⁴⁹ *Itochu Corporation v. Johann M K Blumenthal GmbH & Co KG and anor* [2012] EWCA Civ 996

¹⁰⁵⁰ UNCITRAL Model Law, Article 11 to be read in conjunction with Article 6

¹⁰⁵¹ ACICA FTA Rules, Article 9; SCC FTA Rules, Article 14

¹⁰⁵² SCC FTA Rules, Article 15; SCAI Rules, Article 10

¹⁰⁵³ Welser/Klauegger (2009) p. 270; FCC FTA Rules, Article 12

- he has refused or failed to properly conduct the proceedings or to use all reasonable dispatch in conducting the proceedings or making an award.¹⁰⁵⁴

The bases on which a challenge may be mounted may lie in the arbitration agreement¹⁰⁵⁵ or in the laws governing the arbitration.¹⁰⁵⁶ For example, Section 24 of the English Arbitration Act 1996 contains a number of comprehensive grounds, including:

*“...(d) that he has refused or failed - (i) properly to conduct the proceedings, or (ii) to use all reasonable dispatch in conducting the proceedings or making an award, and that substantial injustice has been or will be caused to the applicant.”*¹⁰⁵⁷

4.5.2.5 The procedure for Challenge

The procedure for challenge would usually be set out either in the arbitration rules that the parties have agreed on or in the law of the place of the arbitration.¹⁰⁵⁸

Parties in FTA are generally limited in the time during which they can object to a proposed arbitrator. Under the most FTA Rules, a challenge must be notified to the other party and to the members of the arbitral tribunal, including the challenged arbitrator within a short time limit.¹⁰⁵⁹ KLRCA FTA Rules direct parties to raise any challenge within seven days (rather than the 15 days specified in the KLRCA Regular arbitration rules)¹⁰⁶⁰

¹⁰⁵⁴ Okekeifere (1998) pp. 129-144

¹⁰⁵⁵ UNCITRAL Model Law, Articles 12 and 14

¹⁰⁵⁶ UNCITRAL Rules, Article 10

¹⁰⁵⁷ English Arbitration Act of 1996, Article 24

¹⁰⁵⁸ Lord Hacking (2006) p. 26-30

¹⁰⁵⁹ SCC FTA Rules, Article 15; WIPO FTA Rules, Article 19; ACICA FTA Rules, Article 9; HKIAC Rules, Article 11; FCC FTA Rules, Article 14; SCAI Rules, Articles 9-11

¹⁰⁶⁰ KLRCA FTA Rules, Article 15

Similarly, Article 10 of the ACICA FTA Rules states that a party who intends to challenge the Arbitrator shall send notice of its challenge within 7 days after being notified of his or her appointment or within 7 days after becoming aware of the circumstances rather than 15 days under Article 14 of its regular arbitration rules.

Under SCC Expedited Rules the time limit is the same as under regular arbitration rules, both stating that a challenge to the appointment of an arbitrator must be made immediately after the alleged disqualifying circumstances have become known to the party, and in any event no later than 15 days thereafter.¹⁰⁶¹

Under the opt-out FTA rules of the SIAC and the HKIAC a challenge to the appointment of an arbitrator must be made immediately after the alleged disqualifying circumstances have become known to the party, and in any event no later than 14 days or 15 days respectively. However, these institutions' FTA rules empower them to shorten those limits.¹⁰⁶²

If the opposing party does not agree to the challenge and the challenged arbitrator does not withdraw, a decision will then be made on the challenge by the appointing authority.¹⁰⁶³ FTA Rules lay out an expedited mechanism for the replacement of sole arbitrators and the procedure to determine whether any hearings will have to be repeated after the replacement of the arbitrator.¹⁰⁶⁴ With these safeguards in place, little can be done to delay the fast-track process by manipulating the constitution of an arbitral tribunal.

¹⁰⁶¹ SCC FTA Rules, Article 15; WIPO Rules, Article 25; WIPO FTA Rules, Article 20; KLRCA Arbitration Rules of 2010, Article 13; KLRCA FTA Rules, Article 15; ACICA Arbitration Rules of 2011, Article 14; ACICA FTA Rules, Article 10; AAA Rules, Articles R11-17 and E4(c)

¹⁰⁶² SIAC Rules, Articles 11 and 12; HKIAC Rules, Article 11

¹⁰⁶³ Panjabi (1995) p. 173

¹⁰⁶⁴ ACICA FTA Rules, Article 10; SCC FTA Rules, Article 15

4.5.2.6 Waiver

If a party makes a challenge late, that is, after a prescribed time limit has expired, his right to object may be regarded as waived so that he may not be able to subsequently challenge the award.¹⁰⁶⁵

Article 26 of the ACICA FTA Rules states:

*“A party that knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating its objection to such non-compliance, shall be deemed to have waived its right to object.”*¹⁰⁶⁶

4.5.3 Organising the Fast-track Proceedings

It is always useful in an international arbitration to convene a preliminary hearing or case management conference once the arbitral tribunal has been constituted.¹⁰⁶⁷ At that stage, control of the arbitral procedure passes, in practical terms, from the parties to the tribunal. If the arbitrator wants to ensure that the parties get a swift and cost-effective resolution of their dispute, he should quickly get involved with case management tasks to make sure that the agreed fast-track procedures are implemented and, where appropriate, to suggest further refinements to those fast-track procedures in the light of current developments.¹⁰⁶⁸

¹⁰⁶⁵ Carbonneau (1996) p.1945

¹⁰⁶⁶ ACICA FTA Rules, Article 26 See also SCC FTA Rules, Article 31; WIPO FTA Rules, Article 52; FCC FTA Rules, Article 25; KLRCA FTA Rules, Article 15; SCAI Rules, Article 30

¹⁰⁶⁷ Böckstiegel (2005) p. 115

¹⁰⁶⁸ Thomson/Finn (2005) p.74

4.5.3.1 Preliminary meetings

It is desirable to have a preliminary meeting between the parties after the commencement of arbitration but before the case management conference.¹⁰⁶⁹ This provides a useful opportunity for representatives of the parties to meet each other before actually meeting the arbitral tribunal. In institutional FTA, the arbitral institution will direct parties to hold such a meeting in an effort to find a common ground acceptable for both parties.¹⁰⁷⁰ In ad-hoc FTA, such meetings help parties to reach a position on various matters, including the question of the amount of the arbitrators' fees and expenses and an agreed time-table for certain interlocutory steps, such as the exchange of pleadings and submissions.¹⁰⁷¹

4.5.3.2 The Case Management Conference (Preliminary Hearing)

The main opportunity for an arbitrator to employ case management is at the case management conference (also known as the preliminary hearing).¹⁰⁷² This is a particularly important procedural step if the parties and their representatives come from different cultural and legal backgrounds.¹⁰⁷³

The main purpose of the case management conference is to provide an opportunity for all the participants to get to know each other, to exchange preliminary views and to work towards a consensus on the exact fast-track procedure to be followed such as time limits and procedural constraints.¹⁰⁷⁴

The case management conference serves two additional functions.

¹⁰⁶⁹ Khanna (2010) p. 238

¹⁰⁷⁰ SCC FTA Rules, Article 6; SCAI Rules, Article 2(3)

¹⁰⁷¹ Welser/Berti (2010) p. 79

¹⁰⁷² Blankenship (2010) p. 119

¹⁰⁷³ Tiessen (2006)

¹⁰⁷⁴ Ball (1998) p. 33

First, it is an opportunity for the arbitrator to begin to impose his authority on the fast-track proceedings and the parties.¹⁰⁷⁵ Prior to his appointment, the parties are in control. After his appointment, the arbitrator gradually assumes greater control relative to the parties, until, by the conclusion of the hearing, he is in a position to impose a solution when he delivers an enforceable award.¹⁰⁷⁶ Second, it enables the arbitrator and the parties or their representatives to review the fast-track procedure provided for in the FTA agreement, and to seek means of adapting it to meet the needs of the particular dispute.¹⁰⁷⁷ The arbitrator's suggestions regarding fast-track procedure have a greater chance of being accepted if he projects himself at the case management conference in such a way that he is able to gain the confidence of the parties.¹⁰⁷⁸

For both these purposes, it is of crucial importance that the case management conference should be attended by both parties and not merely by their legal representatives.¹⁰⁷⁹ In this way, the experienced arbitrator is able to assess the present state of the relationship between the parties and the effect it could have on the conduct of the fast-track proceedings.¹⁰⁸⁰ More importantly, it will assist the arbitrator to take control of the fast-track procedure to be used and mitigate the danger of it being hijacked by parties' legal representatives, who may have little understanding of the differences between fast-track arbitration and regular arbitration.¹⁰⁸¹

However, if for reasons of convenience or expedition, it is not practical to convene a meeting for the various parties to meet in person, a case management conference can be conducted by video or telephone

¹⁰⁷⁵ Böckstiegel (2005) p. 125

¹⁰⁷⁶ *Ibid*

¹⁰⁷⁷ Khanna (2010) p. 237-240

¹⁰⁷⁸ See i.e. Laurent Levy establishing procedural rules together with parties in ICC Arbitration and submitting these procedural rules as part of the Terms of Reference.

¹⁰⁷⁹ (Interview) Hunter, Martin (2010)

¹⁰⁸⁰ *Ibid*

¹⁰⁸¹ ACICA FTA Rules, Article 6

conference.¹⁰⁸² It is unusual for a preliminary hearing to extend beyond a day, and it may well be completed within a shorter period.¹⁰⁸³ It is a useful way for the tribunal to impose its authority on the parties, face to face in some cases, and for all issues to be discussed fully and ironed out, often more satisfactorily than by way of written communication alone.¹⁰⁸⁴

The following topics are usually discussed in the case management conference:¹⁰⁸⁵ further written statements or submissions; disclosure issues between the parties; disclosure from third parties; expert evidence; witnesses of fact; fixing procedural dates; communications between the parties and between the parties and the tribunal; inter-lawyer correspondence; further procedural hearings; oral hearings; the venue for the hearing; documentation for the hearing; pre-hearing written material; directions for the main hearing; post-hearing briefs and closing submissions; a timetable; and ensuring compliance with fast-track procedures.¹⁰⁸⁶

However, not all of these issues will be discussed in every dispute; the specific matters that need to be determined at the case management conference depend partly on the law governing the arbitration and partly on whether the parties have already subjected the arbitration to a set of ad hoc or institutional rules.¹⁰⁸⁷ If the arbitration is subject to the FTA rules of one of the major international arbitration institutions, it will not be necessary, for example, for the parties to deal directly with the arbitrators in determining the place and the language of the proceedings or the form, length, and time limits for the written submissions that will be presented before the main oral hearing.¹⁰⁸⁸ The case management will usually be the moment to raise objections against the fast-track procedures and timetable or to discuss challenges against

¹⁰⁸² Schultz (2006)

¹⁰⁸³ Böckstiegel (2005)

¹⁰⁸⁴ Chambers (2009) p.52

¹⁰⁸⁵ Khanna (2010) p. 237-240

¹⁰⁸⁶ Heilbron (2008) Chapter 10

¹⁰⁸⁷ Cheung (2008) p.91-104

¹⁰⁸⁸ Zykun (2010)

arbitrators or to determine whether to hold a hearing or conduct documents only FTA.¹⁰⁸⁹

Surprisingly, not many institutional FTA rules impose an obligation to hold a case management meeting. ACICA FTA Rules even prohibit the possibility of any hearing unless exceptional circumstance exists or the parties agree otherwise.¹⁰⁹⁰ Article 23 of the SCC FTA Rules, for instance, direct the Arbitrator, after the referral of the case to him, to promptly establish a timetable for the conduct of the arbitration and to send a copy of the timetable to the parties and to the Secretariat.¹⁰⁹¹ This provision provides the possibility of holding a case-management conference in SCC FTA but it does not say it so clearly.

By contrast, Article 10 of the KLRCA FTA Rules state that, where the arbitration is not a documents-only arbitration, the Arbitral Tribunal shall convene a meeting to be attended by all parties (Case Management Meeting) no later than eight (8) weeks from the date of commencement of the arbitration.¹⁰⁹² Similarly, in WIPO FTA, the Tribunal may, following the submission of the Statement of Defence, conduct a preparatory conference with the parties for the purpose of organizing and scheduling the subsequent proceedings.¹⁰⁹³

Case management conferences may be vital because by the time the dispute arises tactical considerations or parties' deteriorating relationship may make it extremely difficult to agree on a swift and cost-effective procedure on the fast-track procedural matters.¹⁰⁹⁴

¹⁰⁸⁹ Megens/Cubitt (2010)

¹⁰⁹⁰ ACICA FTA Rules, Article 13(2)

¹⁰⁹¹ SCC FTA Rules, Article 23

¹⁰⁹² KLRCA Fast-track Rules, Article 10

¹⁰⁹³ WIPO FTA Rules, Article 41

¹⁰⁹⁴ Friedland (2011)

At the case-management conference, the arbitrator should, after consultation with the parties, draw up a realistic time-table for the steps leading up to the hearing and determine the date of the hearing and its likely duration. A party responsible for a postponement could incur a substantial liability for wasted costs.¹⁰⁹⁵

4.5.3.3 Issuance of Procedural Direction and Timetable

The tribunal should, if there is no case management conference, as soon as practicable after the referral of the case to the Arbitrator, issue written directions on the matters with which the parties must comply, in order for the FTA to progress swiftly to an award.¹⁰⁹⁶

Where the parties have not been able to agree on certain procedural matters such as the length of time required for each procedural steps, the tribunal will have to take control and issue appropriate directions or orders.¹⁰⁹⁷ Depending on the nature and subject matter of the dispute and its complexity, the directions are likely to include some or all of the matters referred to in the institutional FTA Rules.¹⁰⁹⁸

The degree of detail in which the directions are given varies from tribunal to tribunal.¹⁰⁹⁹ Tribunals take account of costs and delay and issues of relevance and proportionality when making directions.¹¹⁰⁰ The tribunal and the parties will also want to consider the extent to which, if at all, the IBA Rules of Evidence or the CIArb Protocol should be incorporated in relation to:¹¹⁰¹ disclosure; party-appointed experts; tribunal-appointed experts; on-site

¹⁰⁹⁵ Needham (1989) pp. 71-72.

¹⁰⁹⁶ Chambers (2009) p. 54

¹⁰⁹⁷ Appel (2006) p.83

¹⁰⁹⁸ *Ibid*

¹⁰⁹⁹ Böckstiegel (2005)

¹¹⁰⁰ ICC Techniques (2007) stating that 82% of the costs of an institution-managed arbitration was represented by lawyers' fees.

¹¹⁰¹ Park (2006) p. 141-154

inspections; the taking of samples and analyses; evidentiary hearings; admissibility; and assessment of evidence.

Decisions on these matters set the parameters for the entire fast-track procedure and therefore have to be resolved before entering into a discussion of the merits.¹¹⁰² The tribunal has to decide whether it wants to dispose of preliminary directions through an order or an interim award.¹¹⁰³ This decision is important because in ICC arbitration any award will have to be confirmed by the ICC Court which can lead to additional delays, and because such an award might be attacked in the courts having jurisdiction over the arbitration.¹¹⁰⁴

Another matter is the ruling on procedural constraints.¹¹⁰⁵ FTA rules give the tribunal the authority to determine procedural shortcuts or to order procedural limitations by selecting from one of the listed methods. For example, the tribunal may require that all communications be e-mailed rather than delivered by expedited postal service in order to accommodate an expedited arbitral schedule.¹¹⁰⁶

The tribunal may also limit the admissible evidence to proofs relating to facts deemed relevant by the tribunal on the basis of a preliminary evaluation of the merits.¹¹⁰⁷

Finally, an important issue for giving procedural directions are the requests by parties asking for the production of documents by the other side.¹¹⁰⁸ Again, depending on the background of the participants, the tribunal might establish

¹¹⁰² Rau/Sherman (1995) p. 104

¹¹⁰³ Gabriel/Raymond (2005) p. 453

¹¹⁰⁴ Meriwether (2007) p. 739; *Minermet SPA Milan v Luckyfield Shipping Corporation S.A.* [2004] 2 Lloyd's Rep. 348

¹¹⁰⁵ Welser/Klausegger (2009) p. 260

¹¹⁰⁶ KLRCA Fast-track Rules (2012), Article 6(5); ACICA FTA Rules, Article 13(1); SCC FTA Rules Articles 19(1) and 19(2) See also AAA/ICDR International Arbitration Rules of 2009, Article 18(1); LCIA Rules, Articles 4(5) and 4(7)

¹¹⁰⁷ Vasani/Tallent (2006) p.255

¹¹⁰⁸ Bedard (2009)

a schedule for the type of limited document disclosure frequently encountered in international commercial arbitration.¹¹⁰⁹ In a really complex dispute, however it may not be practical to take final decisions on matters like submission of evidence, documents disclosure, witness testimony and meetings between experts at the case management conference.¹¹¹⁰ The arbitrator could therefore expressly reserve these matters for further consideration at a subsequent meeting.¹¹¹¹

The time when a tribunal gives directions also varies.¹¹¹² Some tribunals prefer to wait until after the first round of written statements has been exchanged so that such directions can be made in the light of all the issues: others prefer to make directions at an earlier stage.¹¹¹³ If the arbitration is under the ICC Rules then a provisional timetable will follow the Terms of Reference.¹¹¹⁴ Some of these directions may be revisited and updated, or deferred altogether, until nearer the main hearing.

Depending on the FTA, the tribunal will give directions only up to a certain point in time, such as after exchange of experts' reports, or up to and including the main hearing, possibly making the later directions provisional only.¹¹¹⁵

¹¹⁰⁹ Morton (2010) p. 103

¹¹¹⁰ Rogers (1994) p. 113

¹¹¹¹ Moxley (2008) p. 36

¹¹¹² Kaplan (2010) p. 675

¹¹¹³ Craig (2010) p. 243

¹¹¹⁴ Derains/Schwartz (2005); ICC Rules, Article 23

¹¹¹⁵ Bredow (2010)

4.5.4 Written Submissions

Usually the first step that would be taken once the arbitral tribunal has been appointed and the fast-track procedure established would be an exchange between the parties of some informal written submissions.¹¹¹⁶ The first of these, prepared by the attorneys, are summaries of the evidence (rather than witness statements), which can be supplemented by “witness panels,” if needed.¹¹¹⁷ The second is to have each side’s experts submit their view of the case.¹¹¹⁸ Under most FTA Rules, these types of informal submissions may proceed before the tribunal has been established, through the administrative support of the arbitral institution.¹¹¹⁹ Of course, this is only practicable where both parties are fully aware of the issues in dispute and eager to present their case through institutional support and without the tribunal’s direction.¹¹²⁰ In such a case the arbitrator can evaluate their respective contentions later by inspecting the written submissions.¹¹²¹

Written submissions are normally exchanged sequentially, so that the claimant sets out its position first and the respondent then answers.¹¹²² Almost all FTA Rules provide that after the parties have delivered their initial request for arbitration and answer, written pleadings consisting of a “Statement of Case”, “Statement of Defence”, and “Statement of Reply” and further equivalent written pleadings in the event of a counterclaim follow each other within certain time limits.¹¹²³ Thus, if there is a counterclaim, the respondent should submit his counterclaim at the same time as his answer to the claimant’s claim and his document is often known as an “answer and

¹¹¹⁶ Macpherson/Smith/Mitchell (2008) p. 30

¹¹¹⁷ Schifferl (2011)

¹¹¹⁸ *Ibid*

¹¹¹⁹ Broichmann/Ernemann (2010)

¹¹²⁰ Glaholt (2008)

¹¹²¹ Borris (2008) p. 294

¹¹²² Redfern/Hunter(2004) p.292 ¶6-55

¹¹²³ KLRCA Fast-track Rules (2012), Articles 6-8; ACICA FTA Rules, Articles 17-22; SCC FTA Rules Articles 23-24; FCC FTA Rules, Article 16; SCAI Rules, Article 42; VIAC Arbitration Rules of 2013, Article 45

counterclaim”, or “defence and counterclaim”.¹¹²⁴ The claimant then submits his defence to the respondent’s counterclaim; he may also be allowed to submit a reply or rejoinder to the respondent’s answer. It appears from these FTA Rules that subject to any directions to the contrary from the arbitral tribunal the written statements are intended to be the only written submissions in the arbitration, and are to be accompanied by copies of all essential documents on which the party concerned relies.¹¹²⁵ Only in exceptional circumstances will the arbitral tribunal order parties to submit additional written pleadings and documents under FTA proceedings.¹¹²⁶

Article 19 of the SCC FTA Rules, for instance, provides a framework for written submissions and a time-limit within which such documents shall be submitted.¹¹²⁷ Thus, the claimant can submit a statement of claim which should include:¹¹²⁸

- (i) the specific relief sought;
- (ii) the material circumstances on which the Claimant relies; and
- (iii) the documents on which the Claimant relies.

and the respondent can submit a statement of defence which should include:¹¹²⁹

- (i) any objections concerning the existence, validity or applicability of the arbitration agreement;
- (ii) a statement of whether, and to what extent, the Respondent admits or denies the relief sought by the Claimant;
- (iii) the material circumstances on which the Respondent relies;
- (iv) any counterclaim or set-off and the grounds on which it is based;
- (v) the documents on which the Respondent relies.

¹¹²⁴ VIAC Arbitration Rules of 2013, Article 45

¹¹²⁵ SCAI Rules, Article 42

¹¹²⁶ FCC FTA Rules, Article 16

¹¹²⁷ SCC FTA Rules Articles 19

¹¹²⁸ *Ibid* Article 24 (1)

¹¹²⁹ *Ibid* Article 24 (2)

The tribunal sets a time period within which the parties must submit their written pleadings. The next stage, unless for special reasons the Arbitrator decides otherwise, is:¹¹³⁰

- (i) in addition to the Statement of Claim and the Statement of Defence, the parties each may only submit one written statement, including statements of evidence;
- (ii) the statements must be brief; and
- (iii) the time limits within which the documents shall be submitted may not exceed 10 working days.

KLRCA Fast-track Rules provide only seven days to tender written submissions and to exchange documents.¹¹³¹ Under the ACICA and FCC Expedited Arbitration Rules the periods of time fixed by the Arbitrator for the communication of further written statements must not exceed 14 days.¹¹³² While, under ACICA, further submissions depend on the Tribunal's approval, under KLRCA the Claimant has seven days to reply to the statement of defence and the Respondent has seven days to Reply. The Respondent may also submit a *counterclaim* within seven days.¹¹³³

Parties under opt-out FTA Rules may do the same. Thus, all submissions under CIETAC Rules should be made within 20 days rather than the normal RA limit of 45 days.¹¹³⁴ Under most opt-out FTA rules, however, there are no time limits for the submission of briefs and the institutions are authorized to extend or shorten any time limits as they see fit.¹¹³⁵

At the time a written submission is served by one party on the other, a copy is usually served to the tribunal.¹¹³⁶ This enables the arbitral tribunal to study the case at the same time as the parties and avoids the need to read many

¹¹³⁰ *Ibid* Article 19 (3)

¹¹³¹ KLRCA FTA Rules, Articles 8 and 15

¹¹³² ACICA FTA Rules, Article 21(2); FCC FTA Rules, Article 16(3)(c)

¹¹³³ KLRCA FTA Rules, Articles 8-9

¹¹³⁴ CIETAC Rules, Articles 14 and 57

¹¹³⁵ SCAI Rules, Articles 2(3) and 23

¹¹³⁶ McIlwrath/Savage (2010) p. 284-307

volumes of documents in a short period of time after the written stage is completed.¹¹³⁷ It is also useful for the tribunal to have copies of a particular pleading in order to be able to evaluate quickly the merits of any application that may be made (for example for an extension of time for a reply, or for an application for document disclosure request).¹¹³⁸

In all but the simplest dispute, it is desirable for the matters in dispute to be defined in writing.¹¹³⁹ Committing the issues in dispute to writing informs the arbitrator of the matters which he must decide in making his award. This is important because an award which decides upon more or less than the matters submitted to the arbitrator for decision is open to attack.¹¹⁴⁰ Moreover, unless the arbitrator was able to obtain an adequate idea of the issues in dispute at the case management conference, he will be largely dependent on the information obtained from the written submission for giving sensible directions as to how the fast-track proceedings should be conducted.¹¹⁴¹ Written submissions also enable each of the parties to know from the outset the case which he has to meet, enabling each party to restrict their preparations for the hearing to those issues.¹¹⁴²

A number of FTA rules set out fairly detailed provisions concerning written submissions. These provisions usually cover some or all of the following: the contents of the written submissions, including counter-claims and set-off; the periods for filing submissions; and the possibility of amending or supplementing submissions.¹¹⁴³

Other methods can be considered for defining the issues in a fast-track dispute, like requiring both parties to give a brief oral account of what they regard the matters in dispute at the case management conference. However,

¹¹³⁷ Davis (1992) p. 170

¹¹³⁸ Paulsson (2001) p. 607-614

¹¹³⁹ Hunt/Kincaid/Monichino (2007) pp. 81-100

¹¹⁴⁰ Caprasse (2008) p. 721

¹¹⁴¹ Eveleigh (1987) p. 84

¹¹⁴² Mustill/Boyd (1989) pp. 317-318.

¹¹⁴³ *Ibid supra* p. 224 fn. 1123

written submissions provide a more convenient record of matters compared to audio or video recordings.¹¹⁴⁴

The arbitrator in consultation with parties and in the light of initial submissions will select what he considers to be the most important issues and will direct the parties to focus on these issues and suggest to them what writing style and level of complexity they should use when they prepare their statements of claim and defence.¹¹⁴⁵

If parties use an inappropriate level of complexity the FTA may be delayed by written submissions which inadequately describe the situation or, conversely, time and money may be wasted in both producing and assessing unnecessarily voluminous and exhaustive submissions. It is advisable for the parties to sign summary minutes of the case management conference to avoid later disputes as to whether they agreed that these were in fact the issues which the arbitrator was required to decide.¹¹⁴⁶ ICC rules require the arbitrator to draw up a document, defining issues in his terms of reference, to be signed by the arbitrator and the parties, after the parties have identified the issues.¹¹⁴⁷

Alternatively, parties may draw up a joint statement of the matters in dispute without the arbitrator's assistance. The statement should set out the disputed issues and the averments of each party in relation to those issues, the responses of each party to the averments of the other, the facts and contentions of law on which each party relies, and the award which each party desires the arbitrator to make.¹¹⁴⁸

A further advantage of the written statement of case is that the arbitrator is able to read it in advance and approach the hearing with an open but not an

¹¹⁴⁴ Cairns (2010)

¹¹⁴⁵ Thomson/Finn (2005) p. 74

¹¹⁴⁶ Brand (2007)

¹¹⁴⁷ ICC Rules, Article 23; Mustill/Boyd 1989, p. 321 fn. 3

¹¹⁴⁸ SCC Expedited Arbitration Rules of 2010; FCC FTA Rules

empty mind.¹¹⁴⁹ Not only will this save time at the hearing¹¹⁵⁰ but it will enable the arbitrator to play a more constructive role in interlocutory matters.¹¹⁵¹ The requirement that a party's statement should be accompanied by the essential documents on which it relies can significantly reduce the delays and expense associated with document disclosure.¹¹⁵² Thus, although it is during the main oral hearing that the tribunal actually assess the evidence, it is in the written submissions that the parties compile the evidence.¹¹⁵³

In order to keep within shorter time limits, most FTA rules restrict the ordinary procedures available, for example by limiting the number of memorials and cross claims to be submitted, requiring pleadings to be brief and demanding a single exchange of written submissions.¹¹⁵⁴

Articles 10 through 12 of the WIPO FTA Rules require that the Statement of Claim must accompany the Request for Arbitration. Similarly, Articles 35 and 36 require that the Statement of Defence must accompany the Answer to the Request.¹¹⁵⁵ FTA Rules under the KLRCA, ACICA and SCC also compel parties to submit the statement of claim with the request for arbitration and the statement of defence with the answer to the request.¹¹⁵⁶

Under this approach the Statement of Claim must include a comprehensive statement of the facts, legal arguments and all the available evidence must be attached, including all relevant exhibits and any witness statements which support the party's position. The same applies to the Statement of Defence or any counterclaim or set-off alleged by the Respondent. A reply to any counterclaim and set-off will also have to be completed, but no other submissions will be allowed before the hearing.

¹¹⁴⁹ Redfern/Hunter (2004) p.289 ¶¶6-49

¹¹⁵⁰ Mustill/Boyd (1989) p.321

¹¹⁵¹ Eveleigh (1987) p. 84

¹¹⁵² Butler (1994) p. 274

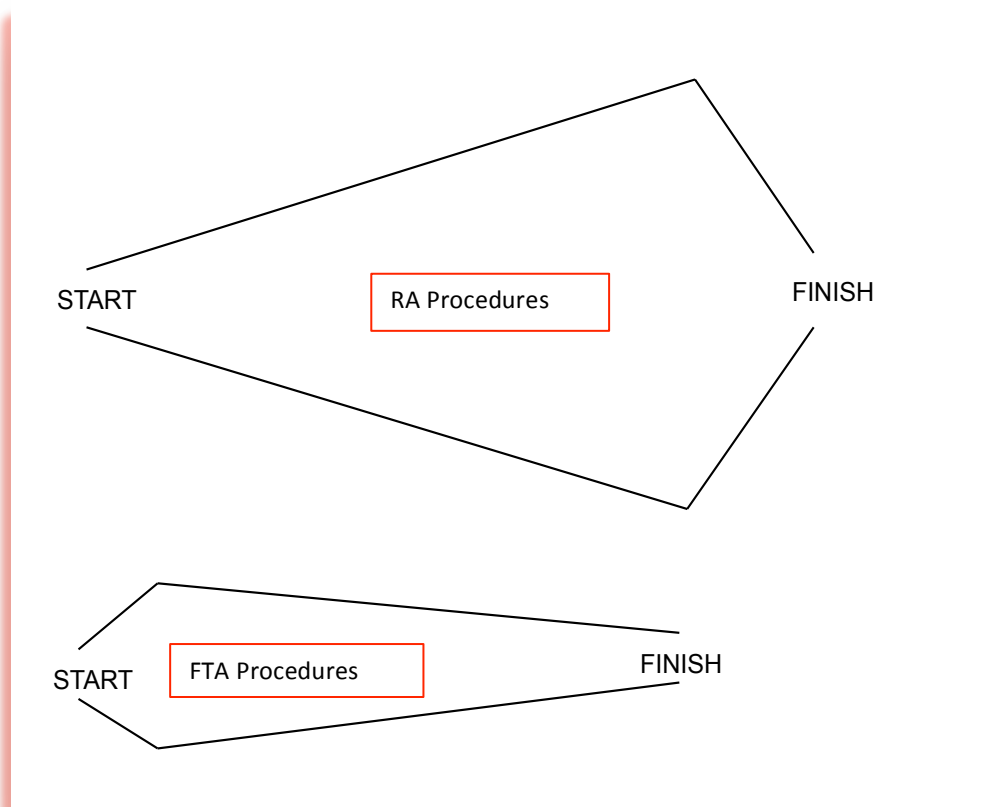
¹¹⁵³ Macpherson/Smith/Mitchell (2008) p. 30

¹¹⁵⁴ Bedard (2009) p. 79

¹¹⁵⁵ WIPO FTA Rules, Articles 10-12 and 35-36 SCC FTA Rules Articles 2-6 and 24-26; ACICIA Fast-track Rules of 2011, Articles 5 17 and 18

¹¹⁵⁶ KLRCA FTA Rules, Articles 3(2)(g), 7 and 8; ACICA FTA Rules, Articles 17 and 18

Figure 19: Newmark's Comparison of Fast-track Procedures and Regular Procedures in terms of re-structured written submissions



Source: Newmark C. (2008) p.84

While simple, such structuring of the written submissions has a significant effect in increasing speed and economy.¹¹⁵⁷ Rather than being permitted to submit skeletal, notice-type pleadings at the outset of the arbitration to be followed by disclosure or document production and more fully developed pre-hearing memorials later, the parties are required to marshal their evidence and legal arguments and present their entire cases at the outset, subject to supplementation in the post-hearing briefs or further written submissions.¹¹⁵⁸ What this approach offers is the possibility of narrowing the focus of the proceedings from an early stage rather than allowing the issues to become more and more diffuse until focus is achieved at, or shortly before, the final hearing. The diagram above used by Newmark to represent this distinction in simple visual terms:¹¹⁵⁹

¹¹⁵⁷ Smit, H. (1998) p.44

¹¹⁵⁸ WIPO FTA Rules, Article 47(e) SCC FTA Rules, Articles 24-34

¹¹⁵⁹ Newmark, C. (2008) p.84

In the first example the parties have started the case without setting out the issues in any detail.¹¹⁶⁰ They have then explored various issues, arguments, documents and witness evidence without any control or constraint.¹¹⁶¹ The scope of the arbitration has broadened as it moves towards a final hearing.¹¹⁶² There is then an effort to focus on what is important, no doubt fuelled by the need to convince the tribunal on the determinative issues. The case therefore narrows significantly at the end.¹¹⁶³ This approach may well produce sound results, but it is likely to be expensive and time consuming.

In the second example, the parties explore and expand the issues in dispute more fully at the outset. This enables the tribunal to work with them to identify what is important in the case. The parties and the tribunal focus on those matters and as the case progresses. This leads to a narrower, quicker and hence cheaper process.¹¹⁶⁴

Limiting the number and complexity of written submissions which can be submitted may increase speed but it also has significant strategic consequences.¹¹⁶⁵ It may constitute a great problem for a party wishing to argue extensively. The requirement that the Request for Arbitration contain the Statement of Claim may disadvantage the claimant who, at that early stage of the dispute, lacks sufficient information to substantiate its claim or seek the appropriate remedy.¹¹⁶⁶ A claimant may also prefer not to disclose all of its arguments and evidence prior to the respondent's defence but will not be able to make further written submissions apart from the response to the counter claim.¹¹⁶⁷

¹¹⁶⁰ *Ibid* see supra p.230 figure 19

¹¹⁶¹ Davison/Nowak (2009) p.163

¹¹⁶² Draetta (2010) p. 351

¹¹⁶³ Newmark (2008) p.85

¹¹⁶⁴ *Ibid*

¹¹⁶⁵ Park (1989) p. 662

¹¹⁶⁶ Smit (1998) p.45

¹¹⁶⁷ *Ibid*

Requiring that the Answer includes the Statement of Defence and shortening deadlines for the Answer may be even more disadvantageous for the respondent.¹¹⁶⁸ While the claimant can take as much time as it needs to compose its Statement of Claim, the respondent will have to formulate and present its case within the tight deadlines prescribed for the Answer.¹¹⁶⁹ This may be as few as 20 days under WIPO and CIETAC FTA Rules or 28 days under KLRCA and ACICA FTA rules.¹¹⁷⁰ By contrast in regular arbitration the limit is 30 days and the answer need not include the Statement of Defence.¹¹⁷¹ Also, as the party more likely to need document production to develop its case, the respondent may be particularly disadvantaged by having to submit its Statement of Defence prior to any document production in the arbitration.

The SCAI Rules provide for one round of pleadings in principle, which means that further briefs may be submitted but only in appropriate circumstances.¹¹⁷² The rules impose limits on the amount of written pleadings, but are silent on total number of such submissions. The SCC and FCC FTA Rules limit the parties' written submissions to one each, in addition to the single exchange of Statement of Claim and Defence.¹¹⁷³

Notably, none of the FTA rules mentioned above contains any sanctions if parties do not limit their documentation, for example if the statement of claim is not made with the request of arbitration or if the respondent does not add the statement of defence to its answer. In practice it is unlikely that the arbitrator would reject a statement of defence if it was not added to the answer but submitted later. Similarly, the arbitrator will have a delicate task in determining what the result should be if either party submits more written pleadings than are allowed. While one party may argue that he has good cause for submitting more pleadings than allowed, the other party may hold

¹¹⁶⁸ Augenblick/Meunier/Robine (1994) p.133

¹¹⁶⁹ Hunt/Kincaid/Monichino (2007)

¹¹⁷⁰ See p.193 Section 4.5.1.3

¹¹⁷¹ Carter (2011)

¹¹⁷² SCAI Rules, Article 42(1)(b)

¹¹⁷³ SCC FTA Rules, Article 19(3); FCC FTA Rules, Article 16(1)(a)

the arbitrator to the literal interpretation of the rules.¹¹⁷⁴ Should the arbitrator refuse to take into account written submissions there is again a chance that a party may challenge the arbitral award claiming a denial of due process as a result of the limitation on pleadings.¹¹⁷⁵ However, for an experienced arbitrator, it would be a challenge but not impossible to find the balance between the parties' interests in this respect. Accordingly, this kind of procedural limitation should normally not cause insurmountable problems.

4.5.4.1 Amendments to the claim or defence

It is not uncommon that during the course of FTA a party may find new evidence, or locate a new witness, or find it necessary to add a new claim, or need to put its case in a different way.¹¹⁷⁶ In these circumstances, the party may want to amend or supplement its pleaded case. The arbitral tribunal will usually allow such amendments unless either the amended claim falls outside the scope of the FTA agreement (and hence, outside the arbitrator's jurisdiction), or the application to amend is made so late that, if it was allowed, it would cause such prejudice to the other party that an award of costs would not provide adequate compensation.¹¹⁷⁷

Article 25 of the SCC Expedited Rules provides that:

*“At any time prior to the close of proceedings pursuant to Article 34, a party may amend or supplement its claim, counterclaim, defence or set-off provided its case, as amended or supplemented, is still comprised by the arbitration agreement, unless the Arbitrator considers it inappropriate to allow such amendment or supplement having regard to the delay in making it, the prejudice to the other party or any other circumstances.”*¹¹⁷⁸

¹¹⁷⁴ Aksen (2007) p. 255

¹¹⁷⁵ Baker/Romman (2009)

¹¹⁷⁶ Szpara/Laszczuk (2010)

¹¹⁷⁷ Pryles (2007) p. 327

¹¹⁷⁸ SCC FTA Rules, Article 25 KLRCA Fast-track Rules (2012), Articles 15; ACICA FTA Rules, Articles 19; FCC FTA Rules, Article 22; SCAI Rules, Article 30; VIAC Arbitration Rules of 2013, Article 28

4.5.4.2 Default of a Party

It is not unusual for one party to default in complying with an order or direction by the arbitral tribunal to serve a pleading.¹¹⁷⁹ For example, this may happen where, the respondent does not wish to participate in fast-track arbitration.¹¹⁸⁰ In this situation, the arbitral tribunal should still continue with the fast-track proceedings.¹¹⁸¹ Most institutional rules require the tribunal to continue with the fast-track proceedings, but without treating the respondent's failure as an admission of the claimant's allegations.¹¹⁸² Thus, the tribunal would not ordinarily have the power to issue a "default" award in favour of the claimant by reason of the respondent's failure to comply with a procedural order. Rather, it must still make a determination on the claims presented in the arbitration hearing having regard to the submissions and evidence presented to it.¹¹⁸³

On the other hand, if the claimant fails to submit a statement of claim in accordance with the arbitral tribunal's order or direction, the arbitral tribunal may be justified in terminating the proceedings.¹¹⁸⁴

Article 30(3) of the SCC Expedited Rules provides that:

*"If a party without good cause fails to comply with any provision of, or requirement under, these Rules or any procedural order given by the Arbitrator, the Arbitrator may draw such inferences as it considers appropriate."*¹¹⁸⁵

¹¹⁷⁹ Craig (2010) p. 270

¹¹⁸⁰ Qureshi (2004)

¹¹⁸¹ Park (2009) p. 629

¹¹⁸² Bernstein (1993) p. 59

¹¹⁸³ Drahozal (2002) p. 419

¹¹⁸⁴ Graves, J. (2010)

¹¹⁸⁵ SCC FTA Rules, Article 30(3) KLRCA Fast-track Rules (2012), Articles 17; ACICA FTA Rules, Articles 25; FCC FTA Rules, Article 24; SCAI Rules, Article 42; VIAC Arbitration Rules of 2013, Article 44

4.5.5 Gathering of Evidence

In fast-track arbitration, oral presentations such as witness and expert testimony are more often replaced by written documents. Physical inspection will also often be made by an expert and reported in writing. Thus, the bulk of the evidence is gathered during the written phase, before the hearing.¹¹⁸⁶

4.5.5.1 Production of documents

A fast-track procedure is only achievable if extensive document production is not required.¹¹⁸⁷ As a general proposition, therefore, requests for document production are not permitted under FTA, although parties are free to voluntarily provide documents which support their case.¹¹⁸⁸

Usually, each party will present the documents that favour its cause and are unfavourable to the other side.¹¹⁸⁹ Sometimes, however, certain key documents will be under the exclusive control of the party for whom they are unfavourable, and the other side may request their production. Where the parties have not agreed upon rules for document disclosure, the tribunal may be called upon to decide whether such a request will be satisfied.¹¹⁹⁰

The SCC Expedited Rules provide for arbitrators to order parties to produce those documents in their possession or power. Article 26(3) states:

*“At the request of a party, the Arbitrator may order a party to produce any documents or other evidence which may be relevant to the outcome of the case.”*¹¹⁹¹

¹¹⁸⁶ Böckstiegel (2010) pp. 1-8

¹¹⁸⁷ Habegger (2006) p. 21

¹¹⁸⁸ Hunt/Kincaid/Monichino (2007) p. 81

¹¹⁸⁹ Hanotiau (2006) p. 113

¹¹⁹⁰ See i.e. Alexander Jolles (Sole Arbitrator) in ICC Arbitration dismissing respondent's requests of document production dated 3 April 2009 and 30 June 2009 in the Procedural Order No. 1 on 31 July 2009.

¹¹⁹¹ SCC FTA Rules, Article 26(3)

Unless compelled to do so by the terms of the arbitration agreement, an arbitrator should make an order for document production only in exceptional circumstances, and then only order limited document production on the specific issues necessary to ensure justice between the parties.¹¹⁹² For the arbitrator to exercise his discretion intelligently when giving directions for limited document production, the issues in dispute must be clearly defined and the arbitrator must be sufficiently informed about those issues.¹¹⁹³ An arbitrator with insufficient information to give directions on document production at a preliminary meeting before written statements of case have been exchanged, should strongly consider directing that document production stand over for consideration at a special additional meeting immediately after the statements have been exchanged.¹¹⁹⁴ If, as the FTA rules of several institutions require, a party's written statement of case is accompanied by copies of all essential documents on which that party relies, the need for full document production should fall away¹¹⁹⁵

The arbitrator's order for document production must be associated with an order for inspection, a time-table for both being set by the arbitrator in his order.¹¹⁹⁶ The key is to have a reasonable document production plan that corresponds with the case's complexity.¹¹⁹⁷ Like everything else in arbitration, the parties can agree to change the terms at any time to make the process better suit their needs. To avoid disputes in this area, a thoughtful arbitrator might invite the parties to revisit their document production intentions, and amend them if necessary.¹¹⁹⁸

¹¹⁹² Needham (1989) p.83, who refers to the reluctance of solicitors to agree to limited document production because of their desire to gain access to possible indiscretions in manuscripts and marginal notes in the opposition's files.

¹¹⁹³ Tackaberry (1987) p. 223

¹¹⁹⁴ If the issue or document production is left to await further consideration at a prehearing review just before the hearing commences, the need for further document production could result in the hearing itself have be postponed

¹¹⁹⁵ Needham (1989) p. 84; Jones (1987) p. 231; Redfern/Hunter(2004) p. 298 ¶¶6-69

¹¹⁹⁶ Mustill/Boyd (1989) p. 326.

¹¹⁹⁷ Tackaberry (1987) p. 223; Mustill/Boyd (1989) p.325-326

¹¹⁹⁸ Hierro (2012) p. 37-47

There is no obligation on an arbitral tribunal to order document production.¹¹⁹⁹ Whether document production, in any form, is required will depend on what procedures are necessary to achieve fairness in the resolution of the dispute.¹²⁰⁰ In *Anangel Peace Compania Naviera SA v. Bacchus International Commerce Corporation*,¹²⁰¹ Robert Goff J found that the arbitrators had not acted unfairly by not requiring the production of scrap logs. The fair logs had been produced during the arbitration, along with other evidence which supported the information in them. It had also been explained that the scrap logs had probably been destroyed. It was then a matter for the arbitrators to form a view on the evidence, after the request had been made informally and an explanation offered. The judge could not find that the failure to order document production constituted misconduct by the arbitrators, so the application to set aside the award or have it remitted was dismissed.¹²⁰²

If a party fails to comply with an arbitral tribunal's order for production of documents and no reasonable excuse is given, the arbitral tribunal is entitled to draw an appropriate adverse inference from that party's failure in relation to the particular issue in respect of which the production of documents was ordered.¹²⁰³

In institutional FTA, the production of documents is usually governed by the rules of that institution. All of the expedited rules provide some form of procedure for the exchange of evidence in advance of the hearing, either by rules specific to the expedited arbitration or by reference to the arbitral tribunal's authority under the FTA rules. The detailed procedures provided in the opt-in FTA Rules explicitly grant the arbitrator the authority to order production of relevant documents or evidence.¹²⁰⁴

¹¹⁹⁹ Honatiau (2009) p. 357

¹²⁰⁰ Hanotiau (2006) p. 113 *et seq*

¹²⁰¹ [1981] 1 Lloyd's Rep. 452

¹²⁰² *Ibid*

¹²⁰³ Sharpe (2006) p. 549

¹²⁰⁴ ACICA FTA Rules, Article 25; WIPO FTA Rules, Article 42; SCC FTA Rules, Article 26.

The AAA Expedited Rules require that parties exchange copies of *“all exhibits they intend to submit at the hearing”* at least two business days before the hearing, but they are silent on whether the tribunal may compel document production by the parties.¹²⁰⁵ The AAA’s Commercial Arbitration Rules, however, vest the arbitrator with the power to compel production of evidence on his or her own initiative or at the request of a party and to order the identification of all witnesses to be called.¹²⁰⁶

The CPR Expedited Rules require that each party provide *“all the documents which it may use in the arbitration”* and permit parties to request the arbitral tribunal to *“order the production of additional specific documents that are essential to a matter of import in the proceeding for which a party can demonstrate a substantial need”*.¹²⁰⁷ This departs from the regular CPR procedures, under which parties are encouraged to agree on one of four “modes” of disclosure, ranging from disclosure of only those documents that parties will present at the hearing, to complete disclosure of all *“documents regarding non-privileged matters that are relevant to any party’s claim or defence, subject to the limitations of reasonableness, duplication and undue burden.”*¹²⁰⁸

Other arbitral organisations similarly provide for some form of compelled evidence and document production.¹²⁰⁹ The ICC, the LCIA and the HKIAC articles for expedited arbitration are silent on document production and production of evidence but they permit the arbitral tribunal to compel document production under the regular rules.¹²¹⁰ In practice, documents are

¹²⁰⁵ AAA Rules, Article E-5.

¹²⁰⁶ AAA Rules, Article R-21. ICDR/AAA Arbitration Rules of 2009, Article 19

¹²⁰⁷ CPR Global Rules for Accelerated Commercial Arbitration of 2009, Articles 11(1) and 11(2)

¹²⁰⁸ International Institute for Conflict Prevention & Resolution, CPR Protocol on Disclosure of Documents and Presentation of Witnesses in Commercial Arbitration, Schedule 1 (2009) Abyei.cpradr.org/ClausesRules/CPRProtocolonDisclosure/tabid/393/Default.aspx.

¹²⁰⁹ Bedard (2009) p. 74

¹²¹⁰ ICC Rules of Arbitration of 2012, Article 20.1; LCIA Rules, Article 22; HKIAC Rules, Article 23.3.

invariably produced by the parties in the subsequent written pleadings or delivered pursuant to a procedural order made by the arbitral tribunal.¹²¹¹

Even if document production is successfully controlled to limit the production of unnecessary documents, the arbitrator should ensure that documents produced at the hearing have been subjected to a proper process of selection and classification.¹²¹² Otherwise the efficiency of the hearing can be compromised by the need to manhandle large quantities of copy documents, most of them quite useless, and to keep track of the much smaller number which are really relevant.¹²¹³

The arbitral tribunal may issue directions as to precisely how documents are to be presented if they have not already been presented together with the statement of case or statement of defence.¹²¹⁴ The tribunal may direct the parties to collate the documentary evidence in the form of one or more volumes of documents, in chronological order with each page numbered for use at the hearing.¹²¹⁵ The arbitral tribunal and the parties should have identical sets of documents for ease of reference. If there are a huge number of documents, it may be a good practice to identify the most important documents and include them in a separate bundle, sometimes called a core bundle.¹²¹⁶

After document production and inspection, the parties should assemble a core bundle comprising all the documents which either or both of them consider should be before the arbitrator at the hearing.¹²¹⁷ The compilation of a core bundle has two main advantages. First, it enables the arbitrator to read the relevant documents before the hearing or during adjournments, whichever is

¹²¹¹ ICC Rules, Article 20(5). UNCITRAL Rules, Article 18; LCIA Rules, Article 15.6.

¹²¹² Lord Hacking (1998) p. 237

¹²¹³ Mustill/Boyd (1989) p.327; See also Tackaberry (1987) pp. 224-255

¹²¹⁴ Appel (2006) p. 86

¹²¹⁵ Ulmer (2010) p. 240

¹²¹⁶ Honatiau (2009) p. 358-359

¹²¹⁷ Mustill/Boyd (1989) p. 326

most practical.¹²¹⁸ This avoids time being wasted by counsel or witnesses reading out documents during the hearing itself.¹²¹⁹ Secondly, counsel for both parties can do their preparations for the hearing from identical bundles, making annotations and reference changes during the hearing unnecessary which will again improve the efficiency of the hearing.¹²²⁰

It is sometimes also helpful for the parties to agree that the documents are accurate copies of existing documents and their authenticity is not being challenged.¹²²¹ If one party disputes a document's authenticity, then the party relying on that document will know this in advance so he can take appropriate steps to prove this fact.¹²²²

The most significant limitation on the exchange of documents and other evidence prior to a hearing lies not in the available powers to order limited document production, but in the shortened time frame prescribed for that process.¹²²³ Under the AAA and WIPO Procedures, hearings must begin within 30 days of the arbitrator's appointment. An award must be made within three months of the date on which the claim was referred to the arbitrator under the SCC Expedited Rules and within six months under HKIAC article 38. Document production in regular arbitration can often last six months or more.¹²²⁴

Unfortunately what can happen in practice is that because the time is very limited, the bundle is assembled carelessly, with insufficient knowledge of the dispute.¹²²⁵ Parties' counsel may work on the principle that it is safer to copy and include rather than to omit, leaving the sifting process to be done at the hearing. This is a false economy in fast-track arbitrations.

¹²¹⁸ Hanotiau (2006) p. 116

¹²¹⁹ Mustill/Boyd (1989) p.350

¹²²⁰ Tackaberry (1987) pp. 225-226.

¹²²¹ Fletcher (2006) p.101-111

¹²²² Hill (2008) pp. 89-106

¹²²³ Houtte (2010) p. 1047

¹²²⁴ Marriott (2000) p. 353

¹²²⁵ Rivkin (2010)

Having only a short time before the hearing can result in an outrageously intense period for the party required to find and produce relevant documents, with the risk of over or underproduction and also in extremely curtailed opportunities to obtain document production from the opposing party.¹²²⁶ It is also uncertain whether the arbitrators will be persuaded to curtail document production in view of the shortened time frames, or expect the same document production to be crammed into less time.¹²²⁷ While curtailed document production can often favour the interests of one party over the other, it is difficult to predict which side will benefit in any given future dispute.¹²²⁸

4.5.5.2 Testimony of witnesses

The method by which the testimony of witnesses is presented depends on the preference of the parties and the arbitral tribunal and whether common law or civil law traditions predominate.¹²²⁹ Frequently, a mixture of the two systems is adopted.¹²³⁰ In FTA, it is not considered an essential practice that witnesses should be heard orally in all cases.¹²³¹

*In Dalmia Dairy Industries v National Bank of Pakistan*¹²³² the Sole Arbitrator refused to hear several witnesses requested by the Respondent who argued in London before the Commercial Court and later in the Court of Appeal that the ICC award should be annulled on the ground of the "misconduct" of the Arbitrator when rejecting those procedural requests. The English courts took

¹²²⁶ Slate (2010) p. 195

¹²²⁷ *Ibid*

¹²²⁸ Landau (2007) p. 282

¹²²⁹ Schlabrendorf (2010) pp.1161-1182

¹²³⁰ Bühler/Dorgan (2000) pp. 3-30

¹²³¹ SCC FTA Rules, Article 28; KLRCA Fast-track Rules (2012), Articles 6(5)(k); ACICA FTA Rules, Articles 13(3); FCC FTA Rules, Article 21; SCAI Rules, Article 25(4); VIAC Arbitration Rules of 2013, Article 45(9)(2)

¹²³² [1978] 2 Lloyd's Rep.223 (C.A. 1977)

the view that it was not an infringement of any rule of English public policy for an arbitrator to decline to hear oral testimony.¹²³³

The court, in its judgement stated that:

*“Article 20 of the ICC Rules merely provides that the arbitrator ‘shall have the power to hear witnesses’. It gives him a discretion but imposes no obligation... Indeed, the procedure followed by the arbitrator in this case is in my experience the usual procedure in ICC and other Continental arbitrations. There can, therefore, be no question of any infringement of any rule of English public policy.”*¹²³⁴

Written witness statements may be submitted on oath (in the form of affidavits) or simply signed by the witnesses as witness statements.¹²³⁵ Each party then indicates to the arbitral tribunal which of the other party’s witnesses should be required to attend the hearing for the purpose of being cross-examined.¹²³⁶ The arbitral tribunal may also indicate to the parties which, if any, of the witnesses it wishes to hear in person.¹²³⁷ However, the arbitral tribunal would seldom require a witness to be present if neither party requires his attendance.

Article 53(b) of the WIPO FTA Rules requires that parties *“bring to the hearing such persons as necessary to adequately inform the Tribunal of the dispute.”*¹²³⁸ This article is designed to avoid the need to schedule additional hearings to hear particular witnesses.¹²³⁹ Disagreements may arise, however, as to which persons are necessary to adequately inform the Tribunal of the

¹²³³ *Ibid* p. 226

¹²³⁴ *Ibid* p. 270

¹²³⁵ Schneider (2011)

¹²³⁶ *Ibid*

¹²³⁷ Schlabrendorf (2010) p. 1170

¹²³⁸ WIPO FTA Rules, Article 53

¹²³⁹ Smit (1991) p.140. The requirement that each party “bring” such persons to the hearing does not mean that such persons must also actually be present during the hearing, as the Tribunal retains authority under Article 54 to direct that *“any witness shall retire during any part of the proceedings, particularly during the testimony of other witnesses.”*

dispute. Clearly, each side should make available any witnesses on which it intends to rely in support of its case as well as any other witnesses the Tribunal directs be made available.¹²⁴⁰ The identity of the party representatives and witnesses to be heard at the hearing should generally be agreed with the Tribunal in advance of the hearing. In most cases the Tribunal should ensure that all testimonial evidence is submitted in the form of witness statements in advance of the hearing to eliminate the need for direct testimony at the hearing.¹²⁴¹

Most institutional FTA rules do not contain any specific or detailed provisions governing the procedure for witness evidence to be presented to the arbitral tribunal.¹²⁴² Accordingly the fast-track procedure to be followed under such FTA Rules is dealt with by agreement of the parties or, failing agreement, at the discretion of the arbitral tribunal.¹²⁴³ Either party may request that a witness attend, subject to the discretion of the arbitral tribunal. If a witness fails to attend it may affect the weight to be given to his evidence or result in the evidence being excluded.¹²⁴⁴

The weight to be given to witness evidence rests with the arbitral tribunal. The SCC Expedited Rules provide:

*“The admissibility, relevance, materiality and weight of evidence shall be for the Arbitrator to determine.”*¹²⁴⁵

Arbitral tribunals generally give more weight to corroborated witness testimony.¹²⁴⁶ Greater weight would also be given to the evidence of a witness who has been tested by cross-examination, or by an examination by the

¹²⁴⁰ A similar direction was issued by the Tribunal in the Fast-Track Arbitration, namely that all witnesses be made available at the hearing. See Smit (1991) p.140.

¹²⁴¹ WIPO FTA Rules, Article 54(d) (authorizing the Tribunal to direct that the testimony of witnesses be submitted in written form by way of signed statements, sworn affidavits or otherwise).

¹²⁴² SCC FTA Rules, Article 28

¹²⁴³ Sentner (2008) p. 77

¹²⁴⁴ Shore (2004) p. 76

¹²⁴⁵ SCC FTA Rules, Article 26(1)

¹²⁴⁶ Shore (2004) p. 77

arbitral tribunal.¹²⁴⁷ The untested evidence of a witness who has a vested interest in the outcome of a case may be given less weight than the evidence of an independent witness.¹²⁴⁸

4.5.5.3 Expert Evidence

Where an arbitral tribunal needs the assistance of an expert to determine an issue it may appoint its own expert.¹²⁴⁹ More commonly, the parties will present expert evidence to the tribunal which it may cross examine. For reasons of expediency and cost, the arbitral tribunal may limit the number of experts each side may present.¹²⁵⁰

Any power of the tribunal to engage its own witness will be expressly set out in the arbitration agreement or incorporated into the agreement by reference to institutional FTA rules of arbitration, or permitted by the *lex arbitri*.¹²⁵¹ The tribunal may require the parties to provide its expert with any relevant information or to produce for inspection any relevant documents, goods or other property that may be required by the expert.¹²⁵²

Generally, the parties have some control over the tribunal's selection of its own expert.¹²⁵³ Some FTA rules provide that the tribunal should involve the parties in the process of appointing any such expert and in defining the scope of the expert's retainer.¹²⁵⁴ Both the SCC Expedited Rules and the WIPO Expedited Rules, for example, state that the tribunal may appoint experts and define their terms of reference *after having consulted the parties*.¹²⁵⁵

¹²⁴⁷ Sharpe (2006) p. 261

¹²⁴⁸ UNCTAD/EDM/Misc.232/Add.36. (2003) p.44

¹²⁴⁹ ICC Case No. 11516/KGA AAA Claimant v. BBB Respondent, Terms of Reference for the Expert Appointed by the Arbitral Tribunal (2001)

¹²⁵⁰ Kent (2007)

¹²⁵¹ Kreindler (2005) pp. 87-104

¹²⁵² *Ibid*

¹²⁵³ Professor Karrer's Letters to parties asking their view on the tribunal appointed expert on the delays in the planning and erection of the Ammonia plant. ICC Case No XXXX (1993)

¹²⁵⁴ Fellas (2007)

¹²⁵⁵ SCC FTA Rules, Article 29; WIPO FTA Rules, Article 49

In the absence of any express power, a question may arise as to whether or not an arbitral tribunal has implied power to appoint an expert under the law governing the arbitration.¹²⁵⁶ Most systems of law recognize the principle that, unless authorized to do so by the terms of his appointment, someone to whom a duty has been delegated must not delegate that duty to someone else.¹²⁵⁷ But, as long as the arbitral tribunal is merely taking advice from an expert and not attempting to delegate to him the task of determining or deciding the issue that the tribunal has to decide there should not be any objection to the appointment of an expert by an arbitral tribunal.¹²⁵⁸ Accordingly, even in the absence of an empowering provision of the governing law, an international arbitral tribunal has the power to call upon expert assistance if needed.¹²⁵⁹ The arbitral tribunal should, however, give the parties an opportunity to comment on any such expertise upon which the arbitrators have relied.¹²⁶⁰ The parties may have the right to make objections to the tribunal if they have doubts as to the independence of its expert.¹²⁶¹ Finally, the parties must also be given the opportunity to question any tribunal-appointed expert at a hearing and to present their own expert witnesses to testify on the relevant issues.¹²⁶²

Expert evidence is usually presented in the form of written reports which may be submitted at the same time as the written statements of witnesses of fact, but in any event well in advance of the hearing.¹²⁶³ If the parties present conflicting expert evidence, the expert witnesses must be prepared to appear before the arbitral tribunal for examination.¹²⁶⁴

The end of Article 49(a) of the WIPO Expedited Rules states:

¹²⁵⁶ Brown (2005) p. 77

¹²⁵⁷ *Ibid*

¹²⁵⁸ Breton (2009) p. 117 *et seq*

¹²⁵⁹ *Ibid*

¹²⁶⁰ Feutrill/Rubins (2009) p. 307

¹²⁶¹ Harris (2010) p. 212

¹²⁶² Sachs (2010) p. 216

¹²⁶³ Brown (2005) p. 83

¹²⁶⁴ *Ibid*

*“The terms of reference shall include a requirement that the expert report to the Tribunal within 30 days of receipt of the terms of reference.”*¹²⁶⁵

That deadline is designed to expedite the proceedings, but could raise problems unless flexibly construed.¹²⁶⁶ The thirty-day deadline, for instance, could be too short if, as frequently is the case in international commercial disputes, the issues submitted to the expert are of a complex technical nature.¹²⁶⁷ In such “exceptional” cases, the Tribunal could extend the deadline pursuant to its general authority under Article 32(c)¹²⁶⁸. On the other hand, the 30-day time period may be too long in certain cases, particularly in light of the requirement in Article 35(b) that the hearing be convened within 30 days of receipt of the Answer.¹²⁶⁹ Because the expert's terms of reference will not be established until well after the respondent's Answer is submitted, the expert's report will ordinarily not be due until after the hearing has been held.¹²⁷⁰ That, of course, is an untenable result and inconsistent with the requirement in Article 49(c) that the parties be afforded the opportunity to question the expert, presumably on the basis of his report, at a hearing.¹²⁷¹ This enables the arbitral tribunal to hear the opinions of the experts on specific issues together and at the same time, so that any differences in opinion may be more immediately and readily identified and the experts can be asked to clarify issues on the spot. While the Tribunal is authorized to extend the 30-day time limit for the hearing until after the expert report is submitted, it is not expressly authorized by the Expedited Rules to shorten the 30-day time limit for the expert's report. Unless the Rules are construed to allow the Tribunal to shorten the 30-day time period for the expert's report, the timing of the report will therefore dictate the timing of the hearing.¹²⁷²

¹²⁶⁵ WIPO FTA Rules, Article 49 (a)

¹²⁶⁶ Smit (1998) p. 40

¹²⁶⁷ *Ibid* 41

¹²⁶⁸ WIPO FTA Rules, Article 32 (c)

¹²⁶⁹ WIPO FTA Rules, Article 35 (b)

¹²⁷⁰ Brown (2005) p. 82

¹²⁷¹ WIPO FTA Rules, Article 49 (c)

¹²⁷² Herrmann (2001) p. 76

4.5.5.4 Inspection of the subject matter of the dispute

Another method of obtaining evidence is for the arbitral tribunal itself to inspect the subject matter of the case, for example a site inspection in a large construction, engineering or technical disputes.¹²⁷³

Depending on the circumstances, a site inspection may be very useful to better understand the background of the dispute and the parties' contentions and evidence.¹²⁷⁴ As an alternative, if the costs of arranging and conducting the inspection are not in proportion to the benefits that might be gained, the arbitral tribunal may ask for photographs, models or videotapes to be presented.¹²⁷⁵

As regards the procedure for a physical site inspection, the arbitral tribunal should be careful to ensure that the principle of equality of treatment is strictly observed.¹²⁷⁶ In particular, the arbitral tribunal should normally make a site inspection in the presence of representatives of both parties.¹²⁷⁷ It should also not put questions directly concerning the case to persons working on the site, unless the advocates for the parties are given the opportunity also to ask questions of those persons.¹²⁷⁸

The KLRCA FTA Rules confer express power on the arbitral tribunal to order the parties to make any property or thing available for inspection and to carry out physical inspection of any matter or item that is related to the subject matter of the arbitration.¹²⁷⁹ Similarly, Article 44 of the WIPO Expedited Rules requires the parties to allow the tribunal to inspect the site and any relevant subject matter.¹²⁸⁰

¹²⁷³ Lew (2009) p. 13

¹²⁷⁴ Cook/Garcia (2010) p. 210

¹²⁷⁵ Josiah (2008)

¹²⁷⁶ Ricci (2010) p.1027

¹²⁷⁷ UNCITRAL Model Law, Article 24(2); LCIA Rules, Article 22(1)(e); AAA Commercial Arbitration Rules, Article 13(2)

¹²⁷⁸ Tawil/Montashami/Sheppard (2009)

¹²⁷⁹ KLRCA FTA Rules, Article 6(5)(i)

¹²⁸⁰ WIPO FTA Rules, Article 44

The FCC Expedited Rules require the parties to make available any relevant information to any experts appointed by the arbitral tribunal.¹²⁸¹ However, some FTA Rules like the ACICA and SCC do not confer any express power on the arbitral tribunal to inspect the subject matter of the dispute.¹²⁸²

4.5.6 Pre-Hearing Conference

A preliminary hearing may have been held early on, before the written submissions or pleadings were served but at that time the parties may not have decided on the number of witnesses, factual or expert, that they wished to call.¹²⁸³ Thus at that time the arbitral tribunal may have had insufficient information to effectively plan the main hearing or estimate the length required for it.¹²⁸⁴

A meeting or conference prior to the actual hearing may therefore be desirable to deal with any matters that have not have been dealt with earlier. If it is not practical to deal with such remaining matters through telephone conferences or correspondence, a meeting with the parties should be convened.¹²⁸⁵

Most institutional FTA rules do not mention a pre-hearing conference. The WIPO FTA Rules however provide in Article 41:

¹²⁸¹ FCC FTA Rules, Article 23(2)

¹²⁸² Article 13(1) of the ACICA Rules for Expedited Arbitration of 2011 and Article 19(1) of the SCC FTA Rules imply the power of site inspection, expressly allowing the tribunal to "conduct the arbitration in such manner as he or she considers appropriate". Site visits are arguably "other evidence" in the terms of Article 26(3) of the SCC Expedited Arbitration Rules of 2010.

¹²⁸³ Chambers (2009) p. 60

¹²⁸⁴ *Ibid*

¹²⁸⁵ See ICC Case No. 13583/FM/RCH Summary Minutes of the pre-hearing telephone conference of 19 December 2005 regarding the evidentiary hearing

*“The Tribunal may, in general following the submission of the Statement of Defence, conduct a preparatory conference with the parties for the purpose of organizing and scheduling the subsequent proceedings.”*¹²⁸⁶

4.5.7 Conducting the Hearing

FTA can be conducted without an oral hearing as a documents-only arbitration or with an oral hearing.¹²⁸⁷ In the latter the representatives of the parties have an opportunity to make oral submissions to the arbitral tribunal, and the arbitral tribunal can ask for clarification of matters contained in the written submissions and hear the evidence of witnesses. However, in fast-track arbitration if there is an oral hearing, it is often reduced in length to save time.¹²⁸⁸

Although CIETAC, CPR, SCC and SIAC rules do not limit the duration of the hearing, in each case the arbitral tribunal has discretion to determine the length and procedure of the hearing, if one is to be held.¹²⁸⁹

4.5.7.1 Documents-Only Hearing

A documents-only hearing is, as the name suggests, conducted only by reference to documents presented by the parties.¹²⁹⁰ The Expedited Procedures of many institutional rules allow for a decision to be made solely on written submissions and documentary evidence without any hearing on the merits of dispute, unless the parties request a hearing or the arbitrator deems

¹²⁸⁶ WIPO FTA Rules, Article 41

¹²⁸⁷ SCC FTA Rules, Article 27(1); KLRCA Fast-track Rules (2012), Article 9; ACICA FTA Rules, Articles 13(2); FCC FTA Rules, Article 21; SCAI Rules, Article 42(1)(c); VIAC Arbitration Rules of 2013, Article 45(9)(3)

¹²⁸⁸ See i.e. ACICA FTA Rules, Articles 13(2)

¹²⁸⁹ CIETAC Rules, Article 58; CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 13(1)

¹²⁹⁰ Rutherford (1995)

one necessary.¹²⁹¹ An arbitral tribunal may also proceed to make its award without a hearing if the parties have expressly so agreed.¹²⁹²

Under some FTA rules, documents only arbitration is automatically applicable. Under KLRCA Fast-track Rules, where the aggregate amount of the claim and counter claim in dispute is less than, or unlikely to exceed, US \$75,000, that arbitration must proceed as a documents-only arbitration unless an oral hearing is deemed necessary by the arbitrator in consultation with the parties.¹²⁹³ Similarly, under the AAA Rules, by default hearings do not take place for claims under US\$10,000 and in other cases the parties may, by written agreement, waive their right to a hearing and the claim will be resolved on the basis of submission of documents.¹²⁹⁴

Some rules, like CIETAC, give the tribunal great discretion to refuse an oral hearing.¹²⁹⁵ Indeed, the arbitrator can direct that the procedure be conducted in documents only, even if a party requests an oral hearing. Under CPR and ACICA FTA rules, the arbitrator must deem it appropriate in order to have a hearing.¹²⁹⁶ Under FCC, HKIAC and SCC rules the arbitrator must deem it necessary.¹²⁹⁷ If a party in good faith requests an oral hearing it would, however, be difficult for the arbitrator to conclude that an oral hearing is not necessary. A party's application for an oral hearing would in most cases lead to the inference that such a hearing is necessary.

Unlike other expedited arbitration rules, SIAC rules require a hearing unless parties agree otherwise.¹²⁹⁸ Similarly, the WIPO Expedited Rules do not

¹²⁹¹ KLRCA FTA Rules, Article 9

¹²⁹² Greenberg/Weeramantry (2010) p. 354

¹²⁹³ KLRCA FTA Rules, Article 9(3)

¹²⁹⁴ AAA Rules, Article E6

¹²⁹⁵ CIETAC Rules, Article 58

¹²⁹⁶ ACICA FTA Rules, Article 13(2)(a); CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 13(1)

¹²⁹⁷ FCC FTA Rules, Article 21; HKIAC Rules, Article 38.2(c); CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 13(1); SCC Expedited Rules of 2010, Article 27; HKIAC Rules, Article 38.

¹²⁹⁸ SIAC Rules, Article 5

authorize the Tribunal to dispense with an evidentiary hearing if either of the parties requests such a hearing.¹²⁹⁹ Instead, WIPO rules seek to expedite the proceedings by requiring that the hearing be convened within 30 days after the claimant's receipt of the Answer to the Request and Statement of Defence.¹³⁰⁰ While Statements of Claim and Defence will already have been submitted, thirty days is precious little time to prepare for a hearing.¹³⁰¹ Some or all of the following may have to occur prior to the hearing under WIPO FTA: a preparatory conference held under Article 41 to formulate the issues and schedule the arbitral proceedings; document production completed under Article 42(b); applications for special confidential treatment made under Article 46; expert reports submitted under Article 49; site visits performed under Article 44; notices of experiments submitted under Article 43; further written statements, including any pre-hearing memoranda, submitted under Article 37; applications for interim relief made under Article 40; and witness statements submitted under Article 48(d). Indeed, it appears likely that, in many if not most cases, the Tribunal will be called upon to exercise its authority under Article 32(c) to extend the 30-day deadline for the hearing.¹³⁰²

4.5.7.2 Organization of the hearing

Hearings are normally held on a date fixed by the arbitral tribunal, either at the request of one or both of the parties, or on its own initiative.¹³⁰³ In practice, hearing dates are fixed after consultation with the parties on the dates convenient to the parties, their respective lawyers and the arbitral tribunal.¹³⁰⁴

Considering that the actual hearing provides a recalcitrant party with an opportunity to delay arbitral proceedings, most FTA rules impose limits on the

¹²⁹⁹ Compare SCC FTA Rules, Article 27 ("a hearing shall be held if requested by a party and if deemed necessary by the Arbitrator").

¹³⁰⁰ WIPO FTA Rules, Article 47

¹³⁰¹ Hoellering (1986) pp. 233-34; Silverman (1991) pp. 156-157; Downie (1991) pp. 484-85.

¹³⁰² Davis/Lagace/Volkovitsch (1993) p. 80 (suggesting that time limits imposed on specific stages of the arbitral proceedings may become a "straightjacket with many arms").

¹³⁰³ Molitoris/Abt (2009) p. 179

¹³⁰⁴ Needham (1989) p.51

duration or number of hearings available to parties.¹³⁰⁵ Under AAA, ACICA and JCAA rules the hearing must be completed within one day; under WIPO FTA Rules it is three days; under KLRCA rules, six days.¹³⁰⁶

Limiting the duration of hearings forces the parties to prepare their cases in advance and focus their arguments and evidentiary presentations on the key issues.¹³⁰⁷ While a time-limited hearing may suffice for most FTA disputes, it may not suffice for all, and the Tribunal retains authority to extend the hearing or call additional hearings in exceptional circumstances.¹³⁰⁸ Under SCAI rules the arbitral tribunal shall hold only a single hearing, unless the parties have agreed otherwise.¹³⁰⁹ A single hearing does not mean a single day of hearing. There is no particular restriction on its duration and it may last several consecutive days; but there cannot be a second hearing.¹³¹⁰ Furthermore, a single hearing does not rule out a prehearing conference. Prehearing conferences can be very useful for the organization of a hearing to determine the issues which have to be tried and decided, and to discuss any other procedural arrangements.¹³¹¹

Article 47(b) of the WIPO Expedited Rules states:

“If a hearing is held, it shall be convened within 30 days after the receipt by the Claimant of the Answer to the Request and the Statement of Defense. The Tribunal shall give the parties adequate advance notice of the date, time

¹³⁰⁵ Rhodes/Sloan (1984) p. 37; ICCA Congress Series 5 p. 197-331 (discussing delays encountered at the hearing stage of international arbitrations).

¹³⁰⁶ Similarly, Article 56 of the AAA Expedited Procedures imposes a one-day limit on hearings. In the Fast-Track Arbitration, a one-day hearing was held in which each side was allowed three hours for argument, examination or cross-examination of witnesses or for any other purpose. See Smit (1991) p.139

¹³⁰⁷ At the hearing in the Fast-Track Arbitration, although the parties were free to use their allotted time for examination of witnesses or any other purposes, they largely forewent that opportunity in favor of arguing the key issues in the case. See Smit, H. (1991) p.140; see also Poppleton, A. (1981) p. 7 (noting that the parties will concentrate the presentations of their cases in accordance with the limited time afforded them); Nickles, P. J. (1991) pp.146-47.

¹³⁰⁸ Monichino (2009)

¹³⁰⁹ SCAI Rules, Article 42(1)(c)

¹³¹⁰ See similarly VIAC Arbitration Rules of 2013, Article 45(9)(3)

¹³¹¹ Tiessen (2006)

*and place of the hearing. Except in exceptional circumstances, hearings may not exceed three days. Each party shall be expected to bring to the hearing such persons as necessary to adequately inform the Tribunal of the dispute.*¹³¹²

However, this article refers both to “the hearing” in the singular and to “hearings” in the plural and it is thus difficult to know how the thirty-day and three-day time periods are to be applied. If more than one hearing is held, must each hearing be convened within thirty days? Does the three-day limit apply to each hearing or is it an aggregate total limit for all of the hearings?¹³¹³ In any event, the Tribunal should always endeavour to schedule hearings at the same time, a practice-tested means of expediting the hearing stage of international arbitrations.¹³¹⁴ Article 47(b)'s final requirement is that the parties “bring to the hearing such persons as necessary to adequately inform the Tribunal of the dispute.”¹³¹⁵ That requirement is designed to facilitate completion of the hearing as expeditiously as possible by avoiding the need to schedule additional hearings to hear particular witnesses. Disagreements may arise, however, as to which persons are necessary to adequately inform the Tribunal of the dispute.¹³¹⁶ Clearly, each side should make available any witnesses on which it intends to rely in support of its case as well as any other witnesses the Tribunal directs be made available. The identity of the party representatives and witnesses to be heard at the hearing should generally be agreed with the Tribunal in advance of the hearing. In most cases, the Tribunal should ensure that all testimonial evidence is submitted in the form of witness statements in advance of the hearing to eliminate the need for direct testimony at the hearing.¹³¹⁷

¹³¹² WIPO FTA Rules, Article 47(b)

¹³¹³ Tschanz (1993) pp. 52-53.

¹³¹⁴ Consecutive hearings not only minimize the difficulties associated with assembling parties and arbitrators of various nationalities at the hearing but also frequently result in the hearings being heard in fewer days than would be the case with multiple non-consecutive hearings. See Poppleton (1981) p. 9

¹³¹⁵ Smit (1991) p.140.

¹³¹⁶ Downie (1991) p. 486

¹³¹⁷ WIPO FTA Rules, Article 54(d) (authorizing the Tribunal to direct that the testimony of witnesses be submitted in written form by way of signed statements, sworn affidavits or otherwise).

While the aim of having written witness statements rather than listening to witnesses at the hearing is to speed the arbitration process, practice has shown that written statements may lead to a lengthier procedure due to the need for reply statements and cross examination, rather than a brief oral questioning by the arbitral tribunal.¹³¹⁸ Therefore, it is usually left to the arbitrator to decide whether written witness statements will serve to accelerate or decelerate the procedure.¹³¹⁹

If there is to be a hearing it is essential that adequate notice is given to the parties.¹³²⁰

Article 27(2) of the SCC Expedited Rules provides:

*“The Arbitrator shall, in consultation with the parties, determine the date, time and location of any hearing and shall provide the parties with reasonable notice thereof.”*¹³²¹

The administrative arrangements for the hearing may be made by one of the parties, normally the claimant, with the agreement of the other. They may also be made by the arbitral tribunal or by the administrative secretary appointed by the arbitral tribunal if one is appointed.¹³²² In some administered arbitrations, for example under the LCIA, the institution may make the arrangements.¹³²³ The administrative matters could include:

- arrangements for interpreters and translators;
- mechanical audio recordings;
- transcription services;
- booking of the hearing room (at a hotel or an arbitration centre with the requisite support, such as photocopying, telecommunications and video conferencing facilities).

¹³¹⁸ Casey/Parker (2008) p.167

¹³¹⁹ Davis, M. (2004)

¹³²⁰ Mohtashami, R. (1999) pp. 124-143

¹³²¹ SCC FTA Rules, Article 27(2)

¹³²² Casey/Parker (2008) p. 167

¹³²³ Nesbitt, S. (2010) p. 401

4.5.7.3 Procedure at the hearing

The objective in FTA is to keep the duration of the hearing to a minimum whilst maintaining equality of treatment of the parties and ensuring that the parties are given a proper opportunity to present their case, in accordance with any relevant applicable laws and public policy considerations.¹³²⁴

The general practice is to permit each party to present a brief opening statement, the assumption being that the arbitral tribunal has already read the documents that have been submitted.¹³²⁵ The oral testimony of any witnesses for each party will then be heard, the claimant's witnesses to be heard first.¹³²⁶ There is usually no examination-in-chief ("direct" examination) as the witnesses' testimony would have been submitted in writing.¹³²⁷ A witness may be given the opportunity to elaborate or clarify what is in his written statement, or add new points, so long as this does not take too much time or introduce new material that may substantially alter the issues already identified by the written pleadings.¹³²⁸

A lengthy oral opening by counsel is unnecessary when the arbitrator has been able to read the statements in advance, particularly if counsel furnished a written opening statement to facilitate understanding of the other documents made available before the hearing.¹³²⁹ However, even where counsel has provided a written opening of his case, a short oral opening can prove helpful.¹³³⁰ This should preferably take the form of a brief and uncontroversial summary of the basic events and issues and the evidence he will present, with reference only to the most important documents.¹³³¹ Claimant's counsel

¹³²⁴ Mohtashami (1999) p. 125

¹³²⁵ Molitoris/Abt (2009) p. 180

¹³²⁶ *Ibid* 181

¹³²⁷ Chambers (2009) p. 55

¹³²⁸ Monichino (2009)

¹³²⁹ Needham (1989) p. 92

¹³³⁰ Eveleigh (1987) p.86

¹³³¹ Lord Hacking (1998)

will have his opportunity to argue his client's case at the conclusion of the evidence.¹³³²

Although the fear has been expressed that by reading the evidence before the hearing the arbitrator could prejudge the issues, this should not be a problem if the arbitrator has been carefully chosen as a person of good standing in his own profession with sufficient training and experience as an arbitrator.¹³³³ Besides making it unnecessary for counsel or witnesses to read documents and enabling witnesses' statements to be taken as evidence-in-chief without substantial oral repetition, reading the evidence before the hearing will reduce the number of interventions by the arbitrator in order to clarify oral evidence or statements.¹³³⁴ It can also reduce the need for copious note-taking, enabling the arbitrator to listen more carefully.¹³³⁵ Pre-reading by the arbitrator can therefore significantly reduce the length of the hearing.¹³³⁶

For the arbitrator to adequately consider the documents before the hearing a key bundle must have been carefully selected and logically arranged by the parties' lawyers and delivered to the arbitrator in good time.¹³³⁷ Moreover, in complex matters, reading documents before the hearing may not be possible without some prior oral explanation.¹³³⁸ In these circumstances it is preferable for the hearing to be adjourned after a short oral explanation to enable the arbitrator to read the documents.¹³³⁹

The fact that the arbitrator has requested and been duly furnished with documents in advance of the hearing unfortunately does not mean that he will have read them.¹³⁴⁰ An arbitrator may find it helpful to allay counsel's fears in

¹³³² Mathy (1985) p. 435

¹³³³ Needham, M. (1989) pp. 101-102

¹³³⁴ Harris (1987) p. 152

¹³³⁵ Eveleigh, E. (1987) p. 86-87

¹³³⁶ Harris, B. (1987) p.152

¹³³⁷ *Ibid*

¹³³⁸ Coe (2002) p. 53

¹³³⁹ Mustill/Boyd (1989) p. 350

¹³⁴⁰ Caulton (1988) p.95

this regard by giving a short and neutral summary of the relevant document(s) at an appropriate point in the hearing.¹³⁴¹

In FTA proceedings, an opportunity for cross-examination of witnesses is almost always given if a party requests it.¹³⁴² Depending on the background of the arbitrators, the witnesses will be questioned either by the tribunal or by the advocates.¹³⁴³ The arbitrator may examine a witness called by the parties, but it is for the parties to decide which witnesses they wish to call.¹³⁴⁴ Frequently, arbitrators commence and then hand over the questioning to the lawyers for cross-examination.¹³⁴⁵ How much cross-examination there will be a function of the legal background of arbitrators and counsel.¹³⁴⁶ Here, the tribunal has to ensure that Civil Law advocates, who often lack familiarity and the skills needed for cross-examination and who are not accustomed to witness coaching, will not be placed at a disadvantage. In common-law style arbitration, testimony will be recorded in literal transcripts, whereas Civil Law style arbitration relies more on summaries usually prepared by the presiding arbitrator and presented to the witness for approval and signature.¹³⁴⁷ Although the tribunal would not embark on a long series of questions to challenge the credibility of a witness, there may be cases where specific questions may have to be asked to test whether or not a witness's statements are reliable.¹³⁴⁸

¹³⁴¹ Mustill/Boyd (1989) p. 350 fn. 4.

¹³⁴² Schneider (2011)

¹³⁴³ *Ibid*

¹³⁴⁴ Zykin (2010)

¹³⁴⁵ Cairns (2010)

¹³⁴⁶ (Interview) Hunter (2010)

¹³⁴⁷ Mohtashami (1999) p. 130

¹³⁴⁸ Holt (2003); See also Chambers, M. (2009) p. 55

4.5.7.4 Post Hearing Briefs

It is becoming increasingly common for tribunals to allow parties to submit post-hearing briefs, which allow parties to address any new material or submissions made by the other party, or answer any questions posed by the tribunal during the hearing to which they did not have the time to respond, or to produce new evidence which came to light after the hearing (but before the tribunal has issued its award).¹³⁴⁹

Article 47(e) of the WIPO Expedited Rules accords each party a right to submit a post-hearing brief within a period of time agreed by the parties or, in the absence of such agreement, determined by the Tribunal.¹³⁵⁰ Unlike Articles 35 and 36, which dictate what the Statements of Claim and Defence must contain, Article 47(e) allows the parties and the Tribunal to tailor the contents of the post-hearing briefs to the needs of the case. If, for example, the hearing is devoted exclusively to examination of witnesses, post-hearing briefs may set forth the parties' arguments based on that evidence and applicable law.¹³⁵¹ In fact, whether post-hearing briefs are necessary at all will depend on the parties' prior opportunities to present their cases in writing, such as in their Statements of Claim and Defence and any further written submissions. The post-hearing briefs contemplated by Article 47(e) appear to have been conceived as an alternative to pre-hearing memorials of the type frequently submitted in international arbitration. If such pre-hearing memorials are submitted in WIPO expedited arbitrations, it may no longer also be necessary to submit post-hearing briefs.¹³⁵²

¹³⁴⁹ Jarvis (1985) p. 19

¹³⁵⁰ WIPO FTA Rules, Article 47(e)

¹³⁵¹ In that connection, it has been suggested that, at the hearing, "arguments of any kind should be cut off and the parties directed to argue the point in their post-hearing briefs." Poppleton (1981) p.10

¹³⁵² As noted above, it is generally preferable that all argument and evidence, including testimonial evidence, be submitted to the Tribunal in advance of the hearing rather than during or after the hearing. See Nickles (1991) p.146; Smit (1991) p.140.

Under the VIAC Arbitration Rules of 2013, there are no post-hearing briefs, as no written submissions shall be filed after the oral hearing.¹³⁵³ This is similarly so under many institutional FTA Rules.¹³⁵⁴

4.5.8 Post-hearing Matters

After the hearing and the submission of any post-hearing briefs the arbitral tribunal may declare the hearings closed.¹³⁵⁵ The usefulness of declaring the hearing closed is to discourage the parties from submitting new material, which will then require further procedural orders to enable the other party to reply.¹³⁵⁶

4.5.8.1 Summary form of the award

FTA provisions vary as regards the provision of a reasoned arbitral award.¹³⁵⁷ Under SCAI Rules, the arbitral tribunal is required to state the reasons upon which it relies in summary form, unless the parties have agreed that no reasons need to be given.¹³⁵⁸ Similarly, section 7 of the DIS SREP regulates that, unless otherwise agreed by the parties, the tribunal need not state the facts of the case in the award.¹³⁵⁹ Under the FCC FTA Rules the arbitral award shall not contain reasons, unless a party has no later than in his closing statement requested a statement of reasons.¹³⁶⁰

The purpose of these provisions is to accelerate the issuance of the award by reducing the time necessary for drafting the decision.¹³⁶¹ These rules only

¹³⁵³ VIAC Arbitration Rules of 2013, Article 45(9)(4)

¹³⁵⁴ FCC FTA Rules, Article 16; HKIAC Rules, Article 38; CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 13(5); SIAC Arbitration Rules of 2008, Article 5

¹³⁵⁵ SCC Expedited Rules of 2010, Article 34

¹³⁵⁶ Park (2009) p. 629

¹³⁵⁷ Scherer (2005) p. 231

¹³⁵⁸ SCAI Rules, Article 42(1)

¹³⁵⁹ DIS SREP, Article 7

¹³⁶⁰ FCC FTA Rules, Article 32

¹³⁶¹ Jarvis, M. (1985) p. 19

address the time-consuming task of drafting and are not intended to limit the time needed to review the arbitration file, analyse the disputed issues, or make a decision on the parties' claims.¹³⁶² Arbitrators still need to have reasons for rendering the awards; they are only discharged from the task of drafting them.¹³⁶³

It should be stressed that any awards rendered in accordance with FTA is a real awards even if the proceedings are expedited.¹³⁶⁴ It is not a recommendation or a summary judgement that can be reviewed by another instance.¹³⁶⁵ The award is final from the moment it is communicated. For all purposes the decision rendered under FTA is an arbitral awards according to the Model Law Article 34 and the NYC Article 5. A court, which may have exclusive jurisdiction for any challenge, will hold awards rendered in expedited proceedings to the same standards as any other arbitral awards.¹³⁶⁶

4.5.8.2 Fees and Costs

Many fast-track arbitration rules correspond to the Standard Rules with regard to fees and costs.¹³⁶⁷ Some institutional rules calculate the arbitrators' compensation on the basis of hours spent.¹³⁶⁸ Others take into account not only the time spent, but also the rapidity of the proceedings and the complexity of the dispute.¹³⁶⁹

Under the UNCITRAL Arbitration Rules, the arbitrator's fees are decided by the arbitral tribunal i.e. the arbitrators decide their own fees, and ascertained

¹³⁶² *Ibid*

¹³⁶³ Scherer/Baizeau (2009) p.130

¹³⁶⁴ Casey/Parker (2008) p. 168

¹³⁶⁵ Baizeau (2009)

¹³⁶⁶ *Ibid*

¹³⁶⁷ See *i.e.* SCAI Rules, Articles 38-41

¹³⁶⁸ CCIG adopts the same position as that of the AAA—but with less flexibility—and the LCIA, and to some extent the ZCC International Arbitration Rules.

¹³⁶⁹ ACICA FTA Rules, Articles 34-36; FCC FTA Rules, Article 21; CPR Global Rules for Accelerated Commercial Arbitration of 2009, Article 17; SCC Expedited Rules of 2010, Articles 42-44

by reference to the time spent on the dispute.¹³⁷⁰ Under institutional arbitration rules not the arbitrator alone but institutional board or court decides the arbitrator's fees in accordance with the scale-fee regulations appended to the institutional rules.¹³⁷¹ It is therefore possible to calculate the costs of the arbitration in advance. The losing party has, as a rule, to pay the arbitrator's fees and the SCC's administrative charges, although the extent to which a party has delayed the proceedings, or in other respects has carelessly increased their cost, is taken into account.¹³⁷²

WIPO Expedited Rules follow similar provisions like its regular arbitration rules with respect to fees and costs.¹³⁷³ The fees payable to the arbitrator shall, unless the parties and the arbitrator agree otherwise, be determined within a range set out in a schedule of fees issued by WIPO Centre. Both the arbitrator's fee and the Centre's charges are calculated on the basis of the disputed amount. Subject to any agreement between the parties, the tribunal shall apportion the cost of the arbitration and the registration and administration fees between the parties in the light of all the circumstances. The tribunal may also, subject to any contrary agreement, order a party to pay the whole or part of reasonable expenses incurred by the other party in presenting its case, including costs for legal representatives and witnesses.¹³⁷⁴

Noticeably, under KLRCA Fast-Track Rules, the costs, which the parties may recover, are capped. In a documents-only arbitration, neither party is entitled to recover more than 30% of the total amount in dispute. In arbitration with an oral hearing, no more than 50% of the amount in dispute can be recovered in

¹³⁷⁰ UNCITRAL Rules, Article 41

¹³⁷¹ SCC FTA Rules, Articles 42-44 (Appendix III, Schedule of Costs)

¹³⁷² SCC Arbitration Rules of 2010, Article 44

¹³⁷³ WIPO Rules, Articles 70-71

¹³⁷⁴ WIPO FTA Rules, Articles 64-65

costs¹³⁷⁵ It should be noted that these percentages are maximum figures and a tribunal may, at its discretion, cap costs at a lower percentage.¹³⁷⁶

Some parties may be tempted by the flexibility offered by the SCC Rules which provide for a wide range of fees schedules and oblige the SCC Court to take into consideration several criteria for the determination of the arbitrators' fees.¹³⁷⁷ Some parties may prefer a simpler approach, based on the hours worked.¹³⁷⁸ Some may prefer to reduce risk by seeking by capping the Tribunals fees and recoverable costs to a fixed scale.¹³⁷⁹ In any event, it seems desirable that arbitration centres offer a plurality of solutions so that users can opt for the system which they believe will best meet their expectations.¹³⁸⁰

4.6 Concluding Remarks

There has been increasing criticism that arbitration has become too much like the courtroom litigation to which it is supposed to offer an alternative.¹³⁸¹ It is unsurprising therefore that arbitral organisations have developed expedited procedures that reduce the length, cost and complexity of regular arbitration. But as we have seen there are substantial differences between the approaches they take to expediting arbitration and parties need to be aware of them. Nevertheless, with care, FTA procedures can minimise the potentially deleterious impact of long delays and excessive costs. FTA rules help parties to focus on speed and cost-efficiency from the moment they draft the arbitration clause to the final issue of the fast-track arbitral award.¹³⁸²

¹³⁷⁵ KLRCA FTA Rules, Article 14(3)

¹³⁷⁶ Craig/Park/Paulsson (2000) p.394

¹³⁷⁷ SCC FTA Rules, Articles 42-44 (Appendix III, Schedule of Costs)

¹³⁷⁸ Goodrich/Hunt (2008)

¹³⁷⁹ Bühler (2004) p. 249

¹³⁸⁰ Aksen (2007) p. 258

¹³⁸¹ Gemandt, J. (2010) p. 119

¹³⁸² Overcash/Gerdes (2009) p.34

The procedural steps discussed in this section are designed to avoid confusion about some of the relatively mundane aspects of fast-track arbitration. They deal with the form and transition of notices, how the periods of time fixed in the FTA Rules are to be calculated, and the authority of parties and Arbitral Institutions to modify those time limits.¹³⁸³

When deciding whether or not FTA is suitable in ICA, the following five items, in particular, should be considered:¹³⁸⁴

- Do FTA time limits provide *enough* time to resolve the dispute?¹³⁸⁵
- Does the procedure for selecting arbitrators provide sufficient time and opportunity to select the arbitrator(s) which will best meet the parties' needs.¹³⁸⁶
- Will procedural constraints jeopardize the chance of presenting a party's case adequately.¹³⁸⁷
- Will provisions for document disclosure allow a party to present its case adequately, and to uncover sufficient evidence as may be needed from the opposing party?¹³⁸⁸
- Will the award (which may be unreasoned) provide a satisfying resolution to the dispute and one which is beyond attack?¹³⁸⁹

These considerations are affected not only by the fast-track rules of the arbitration institution chosen, but by the law of the place of the arbitration, as well as the background and biases of the arbitrators selected.¹³⁹⁰

¹³⁸³ Kraft (2010)

¹³⁸⁴ Krause/East (2009); Oetiker (2008)

¹³⁸⁵ Arias (2010) p.30

¹³⁸⁶ Müller (1998) p.18

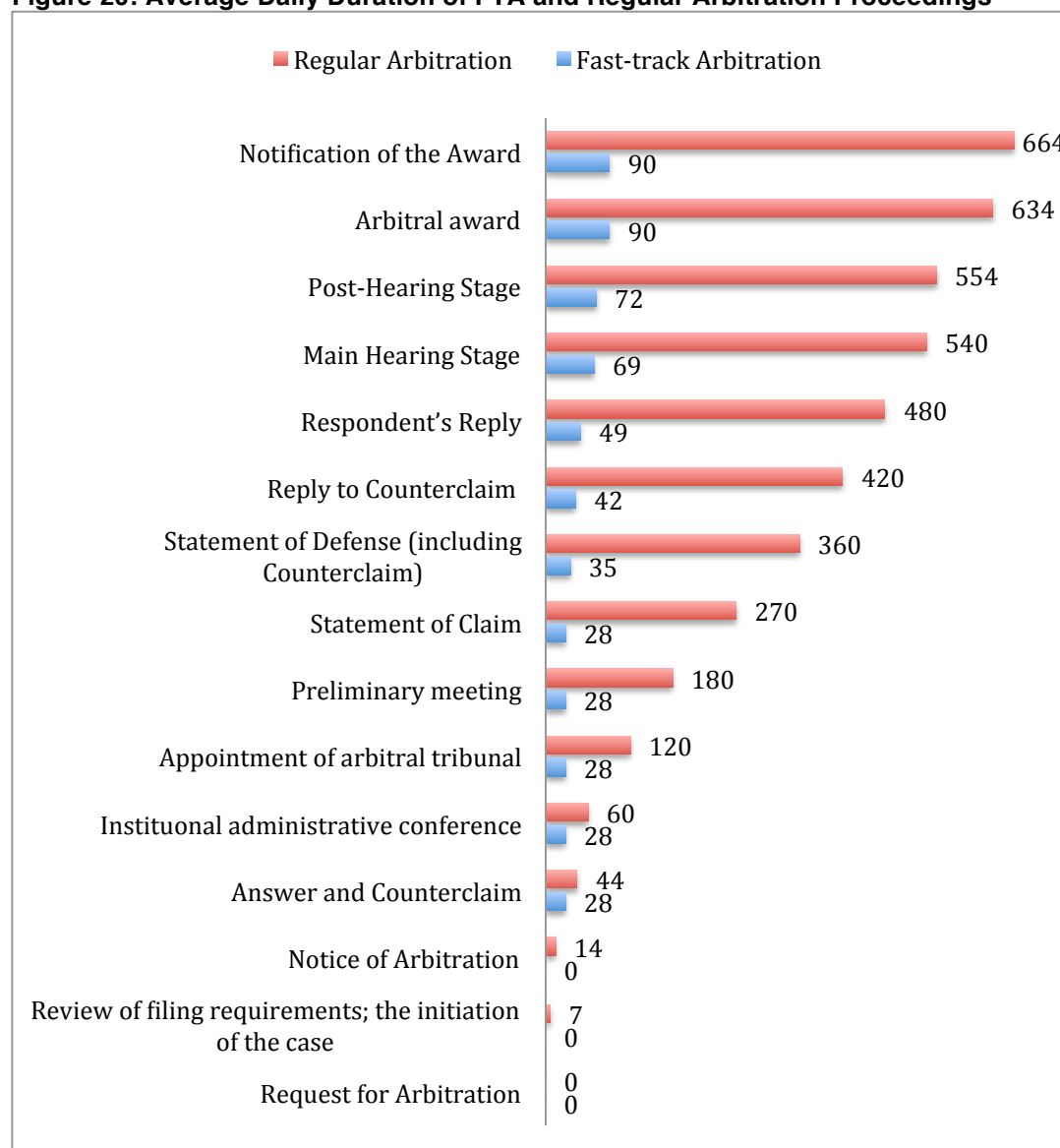
¹³⁸⁷ Sachs, K. (2010)

¹³⁸⁸ Rubinstein, J. (2009)

¹³⁸⁹ Magnusson (2001)

¹³⁹⁰ King/Giaretta (2010)

Figure 20: Average Daily Duration of FTA and Regular Arbitration Proceedings



Source: Institutional FTA and Regular Arbitration Rules

Time and costs can be saved by trying to expedite each procedural step separately. Figure 20 compares the duration of steps in fast-track proceedings with regular arbitration. It takes 15 procedural steps for parties to move from the request of arbitration to the notification of arbitral award. Under regular arbitration rules the whole process takes on average 600-700 days to complete; under FTA it takes on average 90-180 days – a reduction of around 18 months. This is a considerable saving in time but the question that remain is whether the quality and the justice of the final result is sufficiently attractive to allow FTA to be used more often.

5 IS THERE SCOPE FOR THE WIDER APPLICATION OF FTA IN INTERNATIONAL COMMERCIAL DISPUTE RESOLUTION?

In response to the criticism that arbitration proceedings take too long and cost too much, in the past 20 years many institutions have developed specific FTA Rules.¹³⁹¹ FTA procedures are now widely discussed by the arbitration community at arbitration conferences and success stories describing their use are published by arbitral institutions.¹³⁹² It is clear that FTA is popular with some sectors of the arbitration community and for some kinds of dispute.¹³⁹³ But is there scope for wider application of FTA in international commercial disputes?

This chapter attempts to answer to this question with the help of institutional statistics, recent survey reports and examples from arbitration literature. By analysing these results we hope to identify areas where FTA is not currently widely used by the arbitration community and also to offer solutions to the practical difficulties which may otherwise discourage parties from adopting expedited procedure.

5.1 The current level of use of FTA

In 2012 the SIA/WC published the *International Arbitration Survey: Current and Preferred Practices in the Arbitral Process*.¹³⁹⁴ In it, arbitration lawyers, arbitrators, senior in-house counsel, academics and expert witnesses were asked what they thought of FTA. The results showed that FTA is not the Holy Grail that was hoped for. Despite the warm-hearted support of the arbitration community only a small percentage are frequently involved with FTA. *In the*

¹³⁹¹ See Appendix 2

¹³⁹² Conferences: Fast-track arbitration: an idea whose time has come? (2009) IBA Annual Meeting, Madrid, Spain, October 7, 2009; ASA Below 40 Conference (2008) Fast-track Arbitration, Switzerland, Geneva, October 10, 2008.

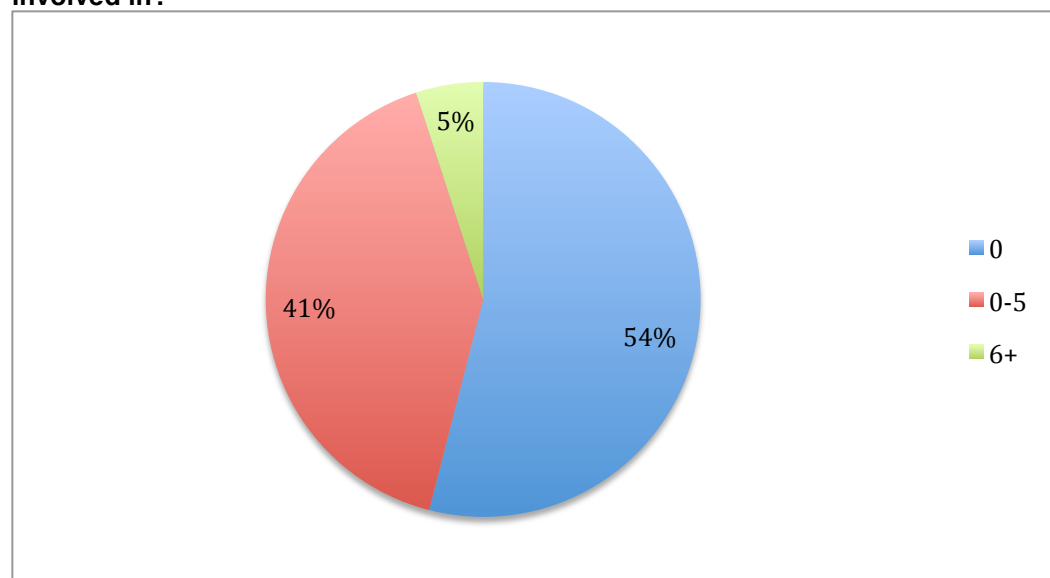
¹³⁹³ *Ibid*

¹³⁹⁴ SIA/WC Survey 2012, p. 2

*past five years only 5% of survey respondents were involved with more than five FTA cases while over 70% of survey respondents were involved with more than five regular arbitration cases.*¹³⁹⁵

Furthermore, in the same period, the vast majority of respondents either had no experience of FTA or were involved in fewer than five FTA cases.¹³⁹⁶ This finding alone suggests there may be scope for increased use of FTA – but whether it can be made more popular in practice depends on why the respondents did not use it. Did they feel it was not appropriate for their disputes? There is good evidence that respondents felt FTA was not appropriate for their disputes.¹³⁹⁷ But they may also have simply not been aware of FTA's potential advantages. And the 5%, who were frequent users may have relied on FTA because they were involved in disputes which occurred in areas where fast-track arbitration is the norm, e.g., commodities or sports.¹³⁹⁸

Figure 21: Over the past 5 years, how many fast-track arbitration cases have you been involved in?



Source: 2012 SIA/WC Survey Report, p.14

¹³⁹⁵ SIA/WC Survey 2012, p.14

¹³⁹⁶ SIA/WC Survey 2012, p.15

¹³⁹⁷ *Ibid*

¹³⁹⁸ Andreeva (2008)

According to Philippe, the greater use of regular arbitration compared to FTA is due in large part to the success of applying methods to expedite international arbitration.¹³⁹⁹ She observed that expedited arbitral proceedings are gaining in popularity, but not necessarily under separate sets of FTA rules.¹⁴⁰⁰ To her, whether there is a scope for the wider application of FTA depends on how you define fast-track procedures. Thus, over the past 5 years, the number of applications made under Article 9 of the LCIA Arbitration Rules for the expedited formation of tribunals has risen from 10 in 2007, to 30 in 2012.¹⁴⁰¹ But there has not been a similar trend for FTA cases within the LCIA.¹⁴⁰² If we allow that the expedited formation of a regular arbitral tribunal is FTA then there does appear to be scope for its wider application.¹⁴⁰³

The SIA/WC survey certainly reported that some methods for expediting international arbitration have become widely used. In Figure 22 we see that the method which respondents considered to be most effective at expediting proceedings was ‘identification by the tribunal of the issues to be determined as soon as possible after constitution’ followed by ‘appointment of a sole arbitrator’ and ‘limiting or excluding document production’. Thus, the idea that separate sets of FTA rules are the best way to achieve quick and economic arbitration appears to be unrealistic and out of step with the modern holistic approach to the international dispute resolution.¹⁴⁰⁴ A variety of methods for expediting international arbitration will continue to play a prominent role in today’s arbitration practice.¹⁴⁰⁵

¹³⁹⁹ Philippe (2002) p.283

¹⁴⁰⁰ *Ibid*

¹⁴⁰¹ LCIA Statistical Reports between 2007 and 2012

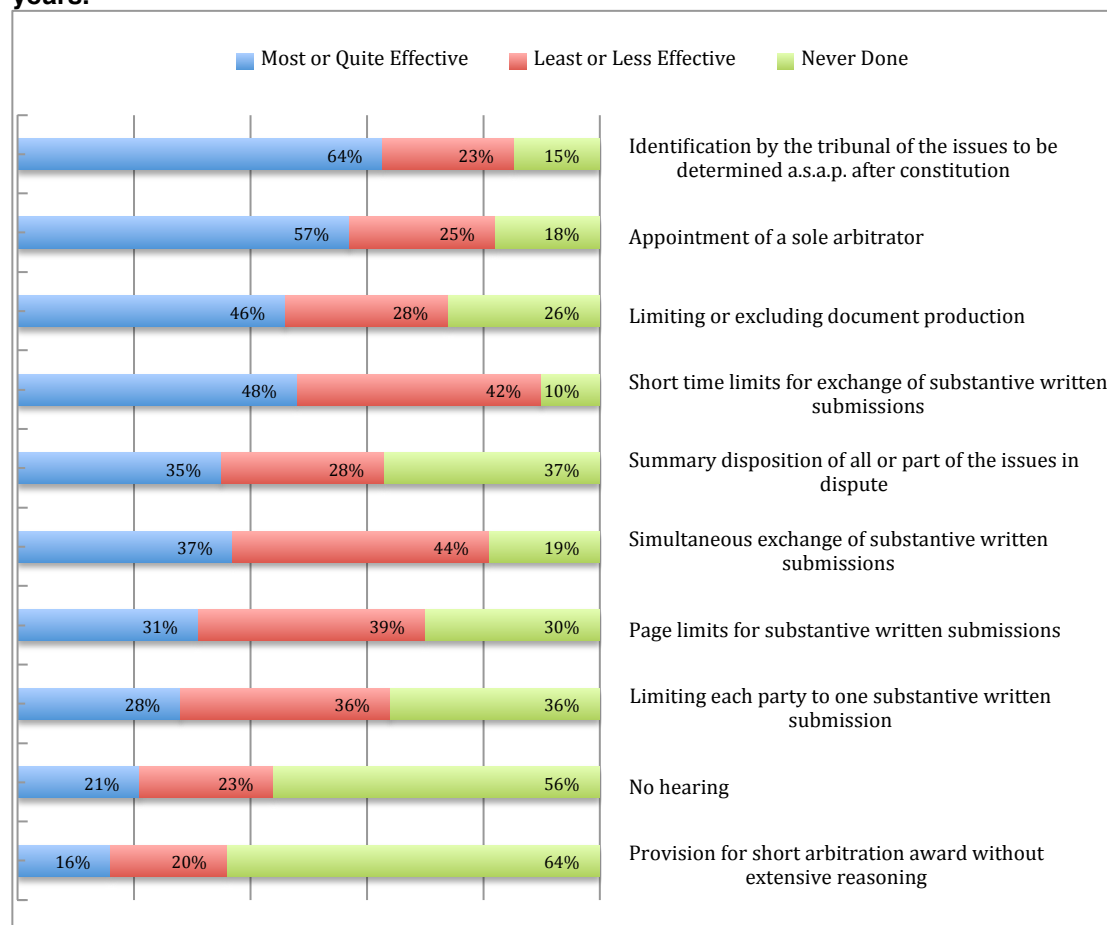
¹⁴⁰² *Ibid*

¹⁴⁰³ McIlwrath/Savage (2010) p.278

¹⁴⁰⁴ Schlabrendorff/Sheppard (2005) pp. 743-777

¹⁴⁰⁵ McIlwrath (2010) p. 532-537

Figure 22: Effectiveness of the following methods in expediting arbitral proceedings according to the experience of the 2012 SIA/WC Survey respondents over the past 5 years.



Source: 2012 SIA/WC Survey Report, p 13

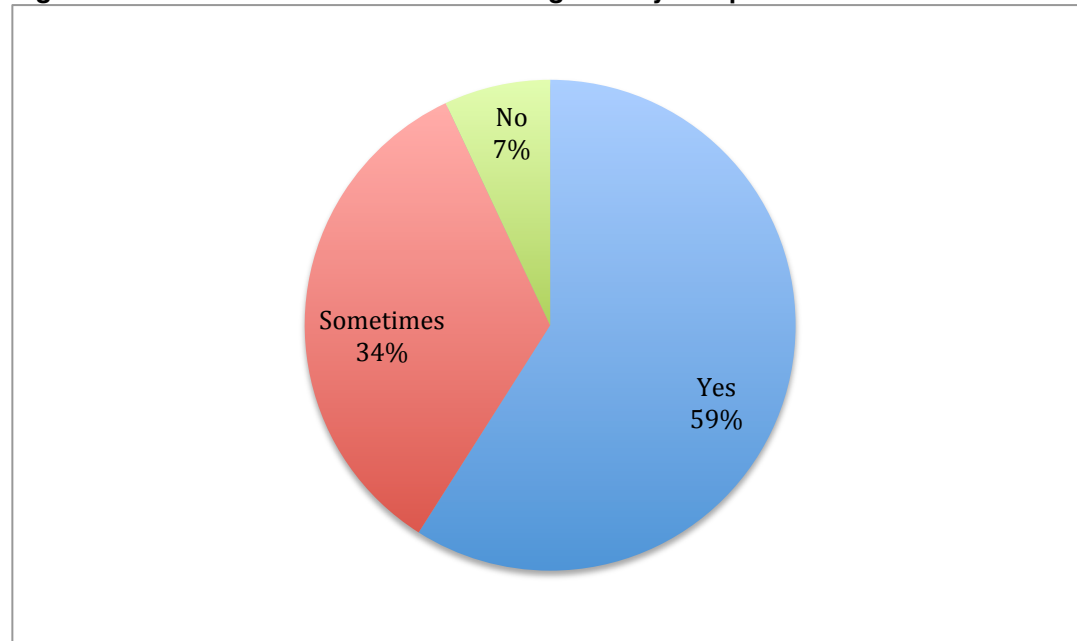
However, not all FTA procedures gained the approval of the respondents. While, almost all of the respondents had experience of setting up 'short time limits for the exchange of substantive written submissions' over the past 5 years, there was disagreement among them on the effectiveness of this method: 48% found it most or quite effective, while 42% said it was the least effective or less effective.

Despite this worrying lack of consensus on the effectiveness of time limits, the vast majority of survey respondent who had FTA experience in the past 5 years reported that shortened time limits were complied with most or some of the time.¹⁴⁰⁶ However, 34% said that time limits were *sometimes* complied

¹⁴⁰⁶ SIA/WC Survey 2012, p. 15

with, which begs the question ‘What stopped the time limits being applied in every case?’ The same is, of course, true for the 7% that said time limits were never observed. This 7% demonstrates a significant failure of FTA to meet its intended shortened duration.

Figure 23: Were the shortened time-limits generally complied with?



Source: 2012 SIA/WC Survey Report, p.15

Furthermore, the majority of respondents had never experienced some of the most cited FTA procedures for expediting arbitral proceedings. For instance, as we see from figure 22, 64% of survey respondents had never experienced the provision for short arbitration award without extensive reasoning.¹⁴⁰⁷ Similarly, 56% of respondents had no experience of an arbitration with no hearing.¹⁴⁰⁸ As we saw in Chapter 4, both of these methods are included in specific sets of FTA rules.¹⁴⁰⁹ Perhaps including these methods discourages parties from agreeing to those packages of FTA rules and therefore to reject FTA.

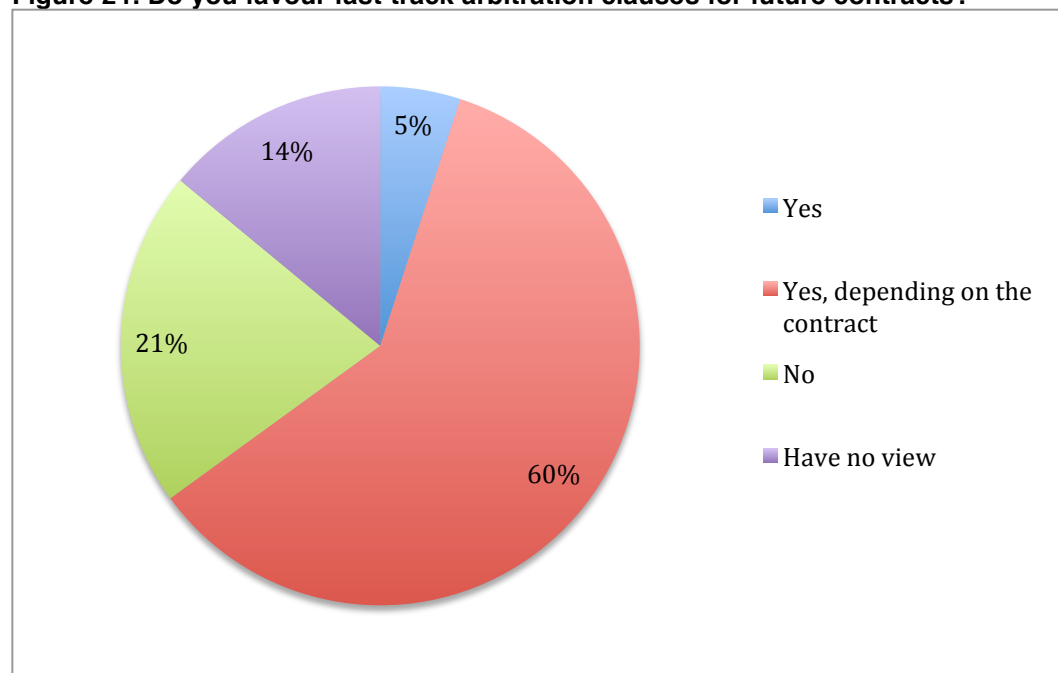
¹⁴⁰⁷ See supra p.268 figure 22 Green list (Never done) See also supra pp. 259-260, Section 4.5.8.1

¹⁴⁰⁸ See supra p.268 figure 22 Green list (Never done) See also supra pp. 250-251, Section 4.5.7.1

¹⁴⁰⁹ See supra pp. 191-261, Section 4.5

In strong contrast to the respondents' modest experience with FTA, the survey suggests that almost two-thirds of participants are willing to consider FTA clauses for future contracts.¹⁴¹⁰ As shown in figure 24, 60% of respondents said that they would favour fast-track clauses (depending on the contract) and another 5% said they unequivocally favour fast-track clauses for future contracts. The fact that only 21% do not favour FTA again indicates there may be great scope for increased use of FTA although how much will depend on why FTA was chosen or rejected.¹⁴¹¹ Finally, 14% expressed no view about using FTA clauses in the future. This suggests that there may be scope for the wider application of FTA if arbitration practitioners can be made aware of its merits.¹⁴¹²

Figure 24: Do you favour fast-track arbitration clauses for future contracts?



Source: 2012 SIA/WC Survey Report, p. 15

Interestingly, the limited application of FTA reported by the 2012 SIA/WC Survey is not consistent with the statistics recently released by arbitral institutions who use specific set of FTA Rules. Figure 25 shows that six hundred and sixty two arbitration cases were filed by the SCAI between 2004

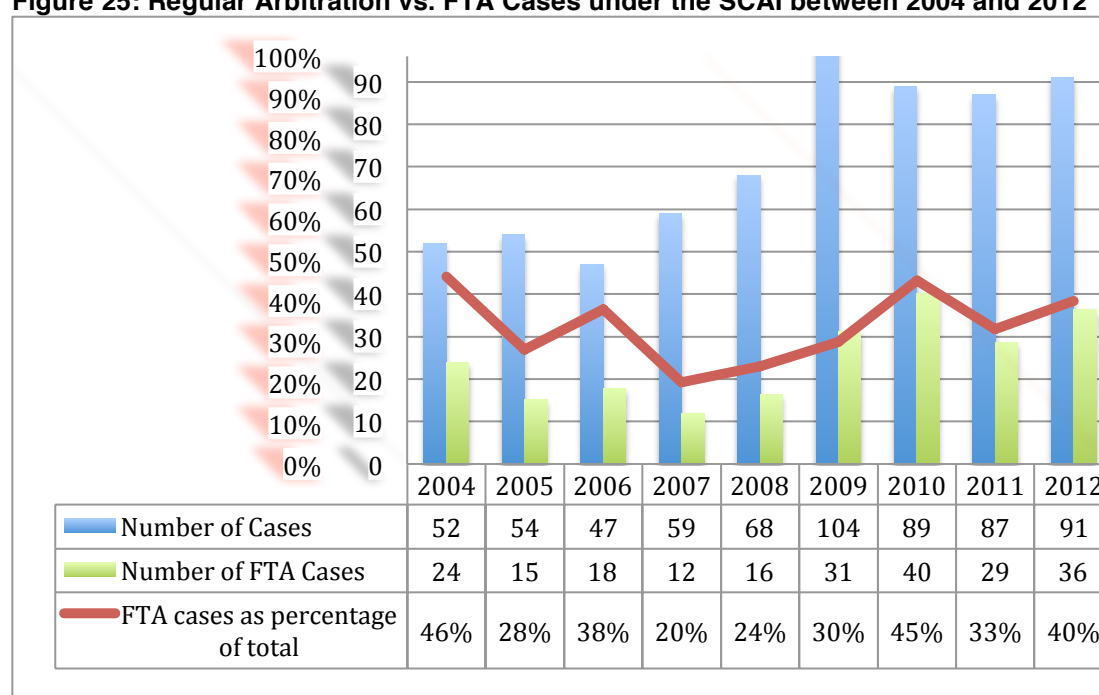
¹⁴¹⁰ SIA/WC Survey 2012, p.15

¹⁴¹¹ Barrington (2009) p. 39

¹⁴¹² Sachs (2010) p. 1055; Arias (2010)

and 2012. Of those cases, 34% were conducted as FTA procedures. Peak years for FTA use were 2004 with 46% and 2010 with 45% of cases being fast track. In 2012 40% of SCAI Arbitrations were FTA conducted according to expedited arbitration procedures of the Article 42 of the SCAI Arbitration Rules. As we see in the previous chapter the SCAI was one of the first arbitral institutions to implement an opt-out approach to FTA procedures.¹⁴¹³ In 2004 it created a monetary threshold of CHF 1,000,000 (one million Swiss francs) below which disputes would automatically be referred to FTA.¹⁴¹⁴

Figure 25: Regular Arbitration vs. FTA Cases under the SCAI between 2004 and 2012



Source: SCAI (Swiss Chambers) Arbitration Statistics

The SIAC is another arbitral institution which on 1 July 2010 introduced an opt-out FTA approach but with a higher monetary threshold.¹⁴¹⁵ However, the relative use of FTA is much less than the SCAI. Figure 26 shows that in the 2.5 years following the introduction of opt-out, the SIAC reported 59 FTA procedures which constituted 13% of the 467 cases submitted. Of these 59 cases, the SIAC accepted 54 under Rule 5(1)(a) (amount in dispute below

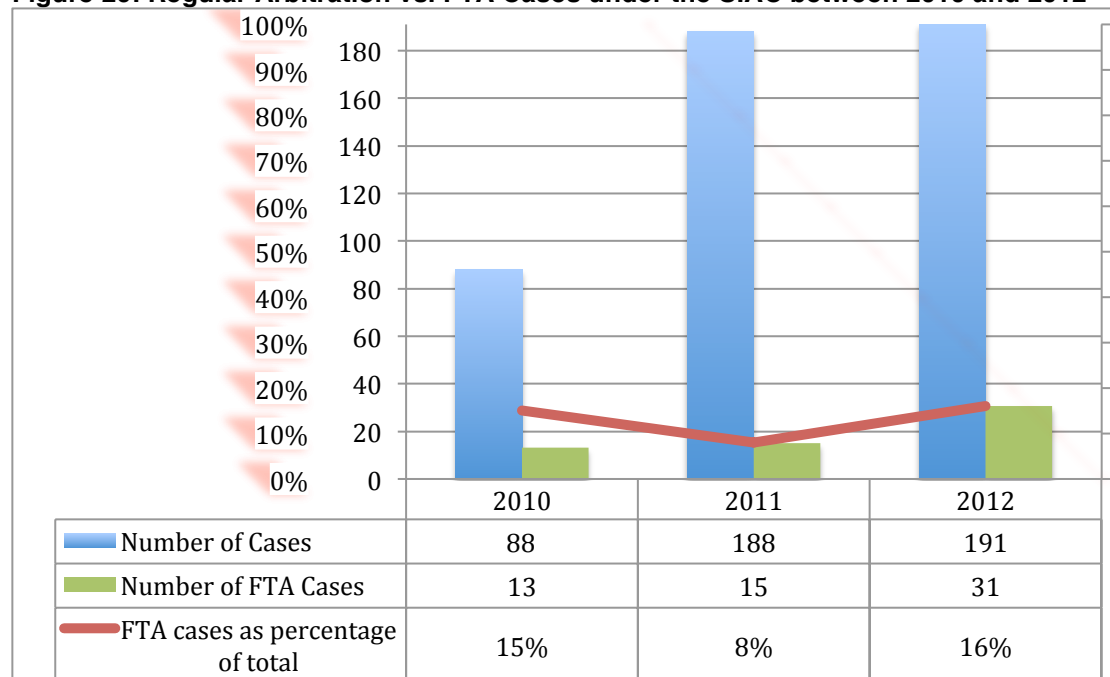
¹⁴¹³ See supra pp.172-174, Section 4.4.6.3

¹⁴¹⁴ SCAI Rules, Article 42

¹⁴¹⁵ SIAC Rules, Article 5

SGD 5 million) and 5 under Rule 5(1)(b) (agreement of the parties). In other words, it appears that 54 FTA applications were opposed and 5 agreed by the parties.¹⁴¹⁶

Figure 26: Regular Arbitration vs. FTA Cases under the SIAC between 2010 and 2012



Source: SIAC Arbitration Statistics

The number of SIAC arbitrations parties submitted to it increased from 88 cases in 2010 to 188 in 2011 and 191 in 2012. The sharp increase came after the introduction of expedited rules in 2010 which may indicate a desire for FTA.¹⁴¹⁷ Recourse to FTA procedure under an opt-out approach can be driven either by the amount in dispute or by the parties' desire for FTA. Thirty-one FTA applications were submitted to SIAC in 2012. Twenty-six depended on the monetary threshold and only two applications were made in accordance with parties' agreement.¹⁴¹⁸

¹⁴¹⁶ See supra p. 178-179 for the role of the SIAC's Chairman in deciding the suitability of FTA cases.

¹⁴¹⁷ But perhaps only FTA as part of regular arbitration; not as a distinct set of FTA rules like those institutional rules for expedited arbitration of SCC, WIPO, ACICA and FCC. See supra pp.171-179 Section 4.4.6.2

¹⁴¹⁸ SIAC Annual Arbitration Statistics of 2012. See also supra p. 178, figure 15

The small number of applications for FTA after the dispute is explained by the conflict of party interests once the dispute has arisen. This indicates that there is a scope for FTA if parties are encouraged to agree to pre-dispute FTA clauses. This would provide scope for the wider application of FTA if automatic application for fast-track procedures fails because the amount in dispute is too high. Accordingly, many institutions that offer an opt-out approach have recently introduced a model FTA clause which allows parties to agree that expedited procedure will apply to disputes with a value greater than the opt-out monetary threshold.

Redfern suggested that addressing the problem of delay and expense in ICA is only possible if the parties are given the opportunity to choose an FTA procedure, and by making that fast-track procedures mandatory for cases below a certain monetary value, as is done in the SCAI and other institutions with opt-out approach.¹⁴¹⁹ However, the numbers of non-mandatory FTA applications under some arbitral institutions offers evidence against this view.¹⁴²⁰ SCC, for instance, outlines the fast-track procedures to be followed and leaves it to parties to make that choice for the application of fast-track procedures.¹⁴²¹ Figure 27 shows that parties submitted 421 requests for FTA to the SCC between 2004 and 2012 which had been filed pursuant SCC's specific sets of FTA Rules. This represented 28% of the 1499 cases submitted during this period.¹⁴²² Similarly, 33% of the 244 cases administered under WIPO Rules since 1994 were conducted in accordance with its expedited procedure.¹⁴²³

¹⁴¹⁹ Redfern (2008) p. 37

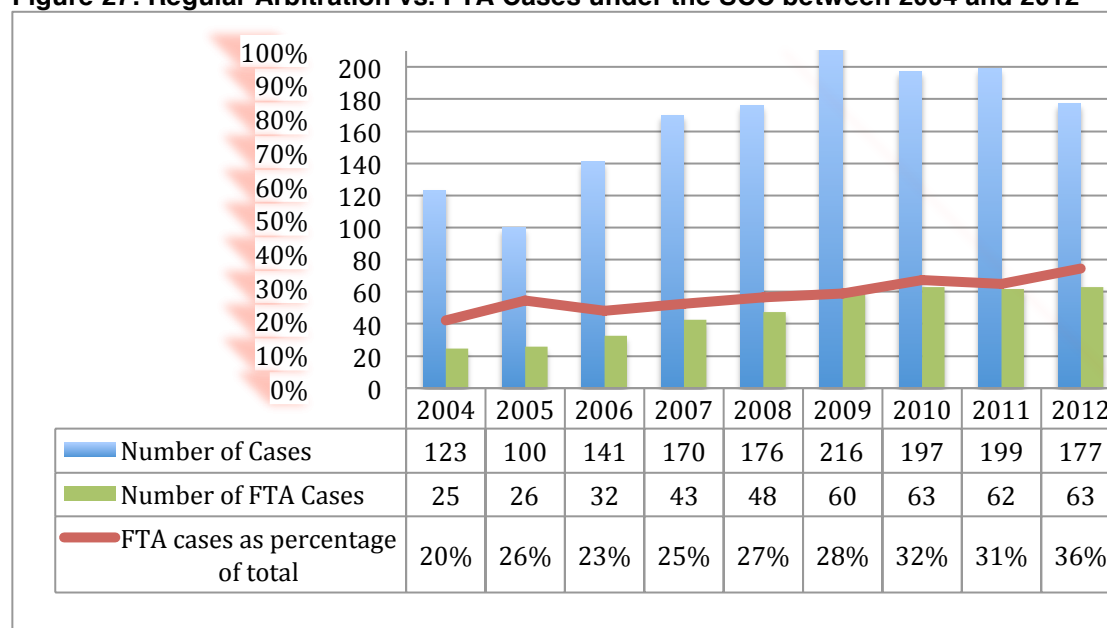
¹⁴²⁰ Bagner (1997) p. 228

¹⁴²¹ Magnusson, A. (2001).

¹⁴²² SCC Caseload 2004-2012, available at <http://www.sccinstitute.com/hem-3/statistik-2.aspx>

¹⁴²³ WIPO Caseload 1994-2012, available at <http://www.wipo.int/amc/en/center/caseload.html>

Figure 27: Regular Arbitration vs. FTA Cases under the SCC between 2004 and 2012



Source: SCC Caseload 2004-2012

Unfortunately, we don't know whether the numbers of FTA cases recorded are related to domestic or international arbitration in the SCC and SCAI Arbitrations.¹⁴²⁴ Without making a clear division between domestic and international FTA cases, these institutional statistics suggest that only around 20-30% of arbitration cases are FTA and this echoes the low percentage of disputes selected for FTA in international commercial dispute resolution.¹⁴²⁵

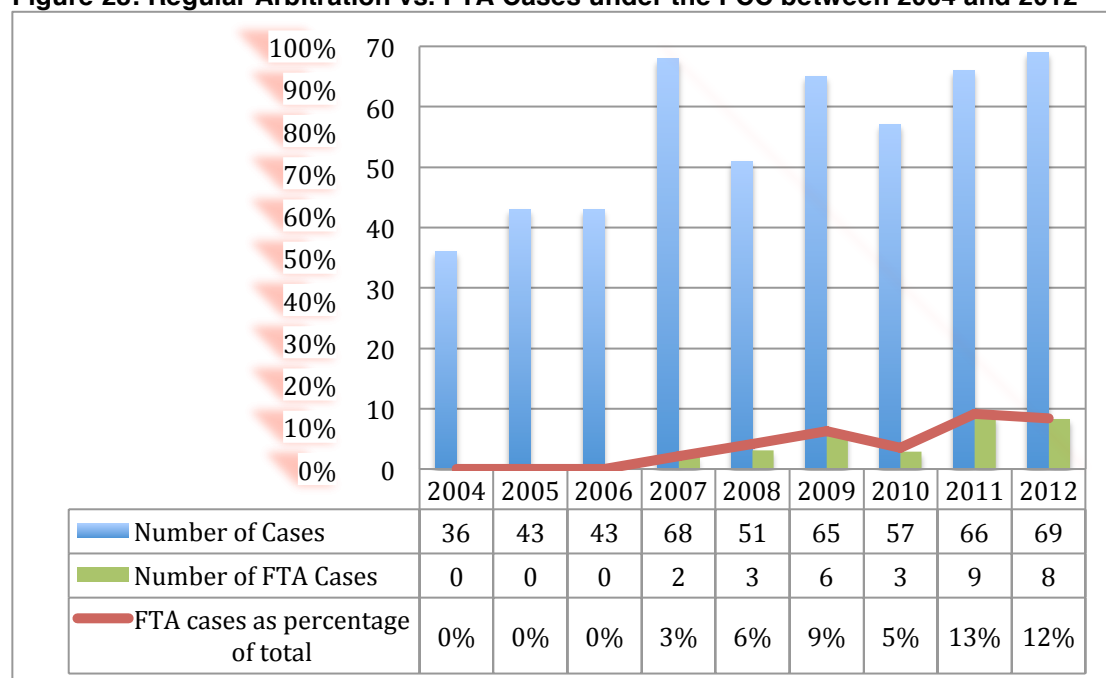
Not all sets of institutional expedited rules have proved to be as popular as those where FTA represents around 25-30% of total cases. Some institutions have no experience with international commercial disputes and others are too recently established to gain the trust of international business users.¹⁴²⁶ Figure 28 shows that the FTA Rules of the FCC did not grab parties' attention. In the first three years there were no FTA cases recorded despite more and more arbitration users becoming aware of this option. Only recently have the numbers of FTA administered by the FCC risen to 13% of the 66 cases filed in 2011 and 12% of the 69 arbitrations in 2012.

¹⁴²⁴ Although these institutions publish the numbers of domestic and international arbitrations they do not so specifically for the numbers of domestic FTA and international FTA.

¹⁴²⁵ See SIAWC Survey 2012, p.14 See also *supra* p. 266 figure 21

¹⁴²⁶ Gaillard (1998) p. 29

Figure 28: Regular Arbitration vs. FTA Cases under the FCC between 2004 and 2012



Source: FCC Arbitration Statistics 2004-2012

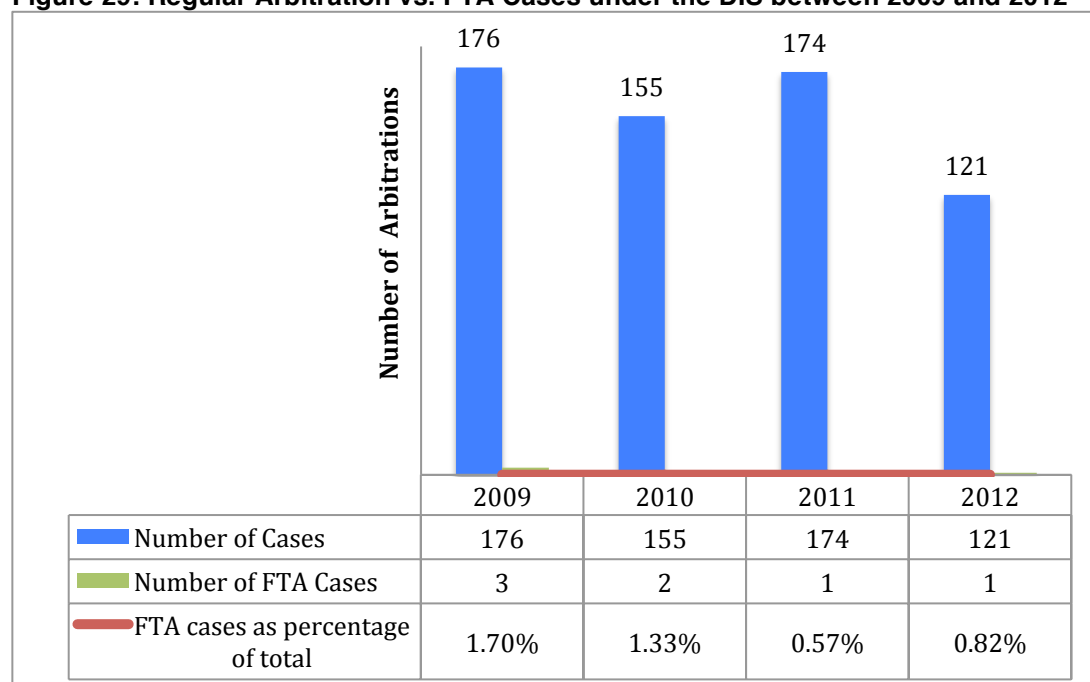
The DIS in Germany published Supplementary Rules for Expedited Proceedings (SREP) in 2008 to encourage FTA procedures.¹⁴²⁷ Figure 29 reveals a very low initial uptake followed by a downward trend. This is because SREP Rules are neither a separate set of FTA Rules (like SCC rules) nor do they provide an opt-out approach to fast-track (like the SCIA and SIAC) for arbitrations below a certain monetary threshold.¹⁴²⁸ In 2009, a year after the SREP Rules were introduced, three FTA cases out of 177 new arbitral proceedings was conducted by the DIS. This reduced to two FTA cases out of 156 in 2010 and only one FTA submitted out of 179 new arbitrations in 2011. Similarly, the ACICA and KLRCA reported no more than two FTA cases respectively in 2010 and 2011.¹⁴²⁹

¹⁴²⁷ Berger, K. P. (2008) p. 595-612

¹⁴²⁸ Bredow (2010); See also Redfern (2008) p. 37 explaining how to make fast-track procedures a real choice for parties.

¹⁴²⁹ See ACICA and KLRCA Caseloads of 2010 and 2011 in their secretariats annual arbitration report.

Figure 29: Regular Arbitration vs. FTA Cases under the DIS between 2009 and 2012



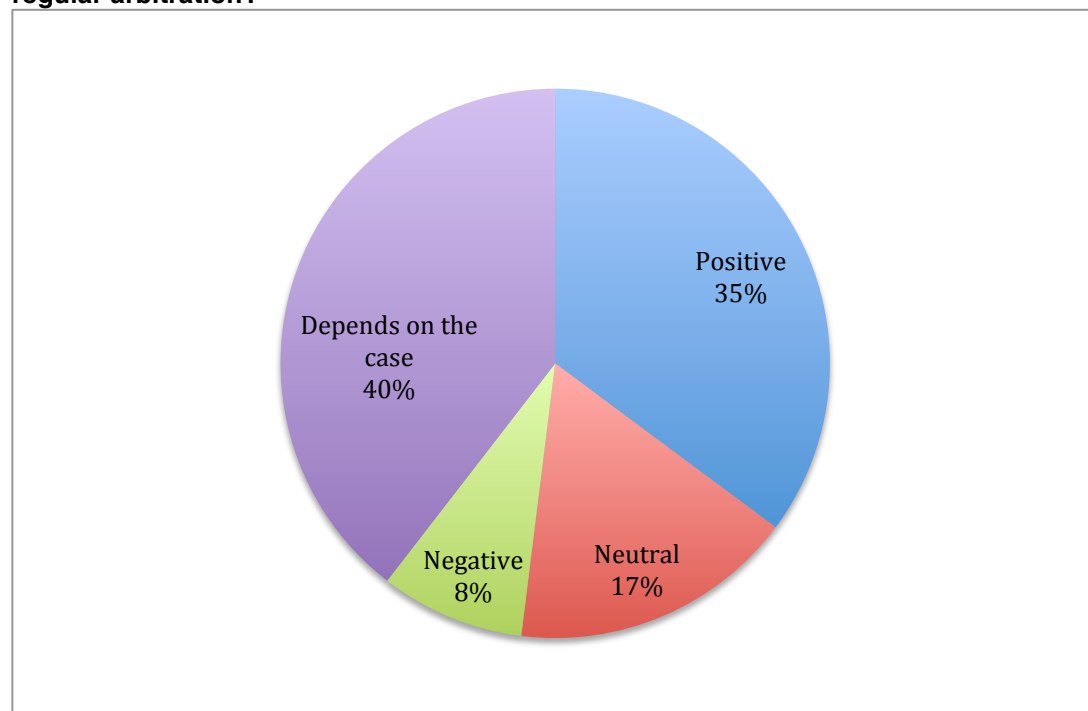
Source: DIS Arbitration Statistics 2009-2012

Statistical data from various arbitral institutions with specific sets of FTA Rules suggest there is scope for the wider application of FTA if one institution learns from the others how it can also expand the use of FTA. Under SIAC, SCC and WIPO the use of FTA increased in both opt-in and opt-out systems. However, this is not replicated by the ACICA, KLRCA, FCC and DIS.

Despite the infrequent use of FTA in international commercial dispute resolution, figure 30 shows that only 8% of the SIA/WC 2012 Survey respondents that used FTA over the past five years were negative about it compared to regular arbitration.¹⁴³⁰ 35% had a positive view and 40% had a positive view depending on the case. 17% either had no view or must have felt FTA was no better or worse than regular arbitration.

¹⁴³⁰ SIA/WC Survey 2012, p.15 Chart 15

Figure 30: How was your experience with fast-track arbitration, when compared to a regular arbitration?



Source: SIA/WC Survey (2012) p.15

The survey further reported that respondents with experience of FTA felt it was more suitable for simpler cases but that in complex cases it jeopardised the quality of the award.¹⁴³¹

This is supported by the institutional statistics that, roughly, only 20-30% of arbitration cases are FTA – a similar percentage to the low value disputes selected for FTA via opt-out Rules.¹⁴³²

The types of disputes amenable to fast-track arbitration have been identified by many authors to include disputes arising out of financial transactions which normally involve issues of default that can be resolved relatively quickly, and price adjustment disputes in long-term contracts, such as the dispute involved

¹⁴³¹ *Ibid* p. 15 See also Hierro (2012) p. 42

¹⁴³² See reports in relation to type of disputes conducted under institutional FTA rules. See for general analysis in Carter (2011); for SCC in Magnusson (2001); and for SCAI in Morton (2010)

in the first FTA cases of the ICC.¹⁴³³ But does it mean that rules for FTA should continue to be confined to specific industries (sports, intellectual property, commodity pricing, maritime disputes, etc.) or to “very low amounts”? While the survey reported only 5% of respondents are regular FTA users, 60% are willing to try it.¹⁴³⁴ This alone indicates there is scope for increased use of FTA. If the international arbitral community is seriously concerned to reduce the time and costs of international arbitration, as it purports to be then it is time to stop tinkering with the existing arbitration rules and give the parties the option of a quicker and more expedited model of international fast-track commercial arbitration.

5.2 Risks associated with FTA when compared with RA

Opponents to FTA are unwilling to try fast-track procedures for international cases. However many types of international disputes have been resolved by FTA. Notable successes are commodities, maritime and construction disputes in England, and sports and WIPO disputes in Switzerland. These positive results allowed FTA to gradually expand over the past 25 years into general international commercial disputes. However, international FTA does involve risk, and worries remain regarding whether due process will be respected, whether mandatory rules will adversely affect fast-track procedures, and whether FTA awards will be enforced globally. This section examines whether these fears can be allayed in order to increase the use of FTA.

¹⁴³³ See *Ibid* See also previous authors with similar observations in Tschanz (1993) p.56; Newman/Burrows (1994) p. 3, col. 1; Ballem (1991) p. 152-153; Silverman (1991) pp.154-158; Watkiss, D. K. (1991) pp. 150

¹⁴³⁴ SIAWC Survey 2012, p.15

5.2.1 Fear of compromising due process

While it is certain that FTA achieves speed and economy, a dispute that is resolved in, say, three days may cause parties to doubt whether due process has been respected and whether the award will be binding and enforceable globally.¹⁴³⁵

The first point to make is that FTA is not intrinsically incompatible with due process. In *Walkinshaw v Diniz* the English High Court Judge rejected the allegations that three days is not enough to conduct a fast-track arbitral procedure because the respondent would not have sufficient opportunities to make its case.¹⁴³⁶ The High Court stated that “if justice so required”, the procedure needed only to involve as many meetings “as required”, and in that case justice did not ask for more.¹⁴³⁷ The English court confirmed that the acceptable speed of arbitration depends on what justice requires and that shortened time limits do not necessarily prevent a party’s right to be heard.

However, according to Schwartz, by its own nature fast-track procedure compromises the equality of parties as it imposes short time-limits and procedural constraints on the respondent for the preparation of the defence.¹⁴³⁸ In FTA the claimant has time to prepare and then to dump a claim on the respondent, who may not have sufficient time to prepare a proper defence.¹⁴³⁹ Fast-track arbitration may therefore simply be an unfair mechanism for the resolution of disputes. It clearly favours the claimant and infringes the defence rights of the respondent.¹⁴⁴⁰ Hence, it has the potential to spawn due process challenges to the arbitral award.¹⁴⁴¹

¹⁴³⁵ Baker/Romman (2009)

¹⁴³⁶ *Walkinshaw v. Diniz* (Stay of Proceedings). (1999, May 19). Queen's bench division (commercial court). [1999] WL 33105608

¹⁴³⁷ *Walkinshaw v Diniz* [2000] 2 All E.R. (Comm) 237

¹⁴³⁸ Schwartz, E. A. (1998) p.144

¹⁴³⁹ Lamm (2009)

¹⁴⁴⁰ *Ibid*

¹⁴⁴¹ Kurkela/Turunen (2010)

In order to reduce such concerns, arbitration institutions have introduced different types of FTA Rules which balance time limits and procedural constraints against due process protection.¹⁴⁴² While parties can select among these FTA rules or adopt their own time limits they cannot limit the authority of arbitrators or arbitral institutions to extend those time limits, or to introduce additional procedural steps if the circumstances of the case require it.¹⁴⁴³ In this way speed can become an objective without reducing due process safeguards.

Thus in *Walkinshaw v Diniz* it was held that, despite FTA Rules, the tribunal would extend time limits to allow the respondent to make submissions for the presentation of its case, and they would add further procedural steps where necessary:

*“As a matter of fairness to TWR/Arrows Respondent in Arbitration, given the sum of money apparently turning indirectly on the answer to this issue a reference to whether the contract had been terminated under clause 9.2(b) or clause 9.5 we think it is wrong to proceed in TWR/Arrows' absence without giving it another opportunity to attend a further CRB meeting arbitration hearing where it could present evidence and argument in support of its case, provided that no irreparable prejudice from such a delay is thereby inflicted upon the Driver or Sauber Claimants in Arbitration.”*¹⁴⁴⁴

The acceptable speed limit here thus depends on “*the matter of fairness*”.¹⁴⁴⁵ However, in order to identify more precisely “*what justice requires*” or “*what the circumstances require*” we need to know how FTA may violate due process in international commercial dispute resolution.¹⁴⁴⁶

¹⁴⁴² Carter (2011) p.4

¹⁴⁴³ Note on Expedited ICC Arbitration Procedure of 2002

¹⁴⁴⁴ [2000] 2 All E.R. (Comm) 23

¹⁴⁴⁵ *Ibid*

¹⁴⁴⁶ Hartwell/Geoffrey (1998) (achieving efficiency without sacrificing due process discussed at session of Working Group II at the 14th ICCA Congress on 5 May 1998 - Paris, France)

The problem for FTA is that there is no authority other than the tribunal's discretion to ensure the compliance with fast-track procedures.¹⁴⁴⁷ But this authority is exercised subject to various constraints. Chief among these is requirement of due process at the place of arbitration.¹⁴⁴⁸ Indeed, due process is often explicitly required by the *lex arbitri* although specific standards may vary from jurisdiction to jurisdiction.¹⁴⁴⁹

Although modern arbitration law almost always takes the view that it is up to the parties and the tribunal to ensure the propriety of the proceedings there are some exceptions to the principle of judicial non-interference.¹⁴⁵⁰ Furthermore, even if courts may not interfere during the conduct of FTA, any instances of procedural misconduct will reappear if the final award is challenged.¹⁴⁵¹ For this reason Paulsson says parties exchange legal security for speed in FTA.¹⁴⁵²

In order to increase the wider application of FTA, fast-track procedures must be made more resistant to claims of due process being violated.¹⁴⁵³ Of course, FTA provisions could abandon the very notion of due process, and instead simply define precise time limits for giving evidence, claims, etc. with no recourse to extensions.¹⁴⁵⁴ This could be legally binding with the right legislation (in sport disputes parties have exactly 24 hours to make their case) but international business users will not want to arbitrate in such an inflexible system.¹⁴⁵⁵ As we observed in the first chapter, ICA traditionally addressed the drawbacks of litigation to business parties.¹⁴⁵⁶ It offered alternatives such

¹⁴⁴⁷ Karrer (1998) p. 136

¹⁴⁴⁸ Sentner (2008) p. 81

¹⁴⁴⁹ See supra p.123-124 Section 4.3

¹⁴⁵⁰ See, e.g., *Tuesday Indus. Ltd v. Condor Indus. Ltd*, [1978] (4) SA 379 (South Africa); *Windward Agency, Inc. v. Cologne Life Reins. Co.*, 123 Fed. App'x 481 (3d Cir. 2005) See Born (2009) p.1341

¹⁴⁵¹ Paulsson (2001) p. 611 (The most serious reservation one may entertain with respect to fast-track procedures flow from the observation that equality may be an elusive concept.) See also Paulsson (1996)

¹⁴⁵² Paulsson (1994) p. 715

¹⁴⁵³ Davis/Smit/Brown/Affaki/et al (1994) p. 454

¹⁴⁵⁴ Baker/Romman (2009)

¹⁴⁵⁵ Müller (1998) p.6

¹⁴⁵⁶ See supra p. 54 Section 1.5

as expert decision-making, procedural adaptability and flexibility, finality, confidentiality and, lastly, time and cost-savings. Emphasising the importance of speed and economy under fast-track procedures does not mean that parties do not want the other fundamental objectives of ICA.¹⁴⁵⁷

Due process is such a subjective and imprecise area that it can be interpreted in many ways.¹⁴⁵⁸ This offers a recalcitrant party opportunities to employ various type of dilatory tactics which are contrary to the overriding objectives of FTA procedures.¹⁴⁵⁹

Some examples of due process violations will clarify how risky it is to conduct international commercial dispute resolution using fast-track procedures. In *MORS v. Supermarket Sys*¹⁴⁶⁰ due process was violated when the tribunal relied on a submission which it had previously rejected as being out-of-time. In *Groundshire Ltd v. VHF Constr. plc*¹⁴⁶¹ the due process rights of the parties were breached when the arbitrator relied on his own knowledge, without hearing the parties, on damages issues. In *Zermalt Holdings SA v. Nu-Life Upholstery Repairs Ltd*¹⁴⁶² the arbitrators came to a decision based on factual materials which were not advanced by the parties. The court stated:

*“If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission, then again it is his duty to give the parties a chance to comment”*¹⁴⁶³

FTA Rules sometimes require arbitrators to conduct private fact-finding, such as independently visiting construction sites, contacting one party regarding the

¹⁴⁵⁷ Hierro (2012) p. 38

¹⁴⁵⁸ Paulsson (2001) p. 612 See for a discussion of due process theories Rutherford (1992)

¹⁴⁵⁹ Conference (2009), Due Process in International Arbitration, 12th IBA International Arbitration Day

¹⁴⁶⁰ Cour d'appel, Paris, Judgment of 18 April 1991, 1995 Rev Arb 448

¹⁴⁶¹ [2001] B.L.R. 395 (Q.B.)

¹⁴⁶² [1984] 2 EGLR 14 (Q.B.)

¹⁴⁶³ *Ibid* p. 15

substance of the case, or interviewing witnesses. However, the findings of arbitrators may cause problems if they are not communicated to the parties. The Paris Court of Appeal, for instance, annulled an award in Sporprom Sers. BV v. Polyfacne Immo¹⁴⁶⁴ where the tribunal relied on an expert report not provided to the parties and also in Compagnie Aeroflot v. AGF¹⁴⁶⁵ where the tribunal relied on personal knowledge without communicating it to the parties.

In Totem Marine Tug & Barge, Inc. v. North American Towing, Inc.,¹⁴⁶⁶ the arbitrator engaged in ex parte communications with one party's lawyers, without notifying the adverse party and the court annulled the award due to the arbitrators' ex parte contacts. The court stated that although arbitrators need not follow "*all the niceties observed by the federal courts,*" they must provide the parties with "*a fundamentally fair hearing.*"¹⁴⁶⁷

Similarly, in Vee Networks Ltd v. Econet Wireless Int'l Ltd¹⁴⁶⁸ the court held that:

"by advancing the point of construction not argued by either party the arbitrator was neither acting fairly nor giving each party a reasonable opportunity of putting its case".

A tribunal's refusal to conduct a hearing can be another reason for a party to claim it does not have the opportunity to be heard.¹⁴⁶⁹ In Immoplan v. Mercure¹⁴⁷⁰ one of the parties requested a hearing but the tribunal decided the issue without holding an oral hearing. The court decided that the due process rights of the parties were violated.

¹⁴⁶⁴ Cour d'appel, Paris, Judgment of 18 January 1983, 1984 Rev Arb 87

¹⁴⁶⁵ Cour d'appel, Paris, Judgment of 10 June 1993, 1995 Rev Arb 447 (award annulled where tribunal relied on personal knowledge);

¹⁴⁶⁶ Totem Marine Tug & Barge, Inc. v. North American Towing, Inc., 607 F.2d 649 (5th Cir. 1979)

¹⁴⁶⁷ *Ibid* See also United Food & Comm. Workers Int'l Union v. SIPCO, Inc., 1992 U.S. Dist. LEXIS 21332 (D. Iowa 1992)

¹⁴⁶⁸ [2005] 1 Lloyd's Rep. 192, 194 (Q.B.)

¹⁴⁶⁹ Mantilla-Serrano, (2004) p. 340

¹⁴⁷⁰ Cour d'appel, Paris, Judgment of 19 January 1990, 1991 Rev Arb 125

Similar concerns arise where a party is not provided with proper notice.¹⁴⁷¹ In *PPX Enter Inc. v. Musicali*,¹⁴⁷² failure to timely inform one of the parties of the hearing date violated its due process rights and led to the annulment of the award. Under the shortened time limits of FTA the risk of the arbitral tribunal making such mistakes is much higher than in regular arbitration.¹⁴⁷³

FTA procedures are also criticized on the grounds that scheduling decisions will impede the parties' ability to present their cases, for example, by preventing the attendance of a witness, or by granting counsel less preparation and presentation time than requested.¹⁴⁷⁴ FTA scheduling may also provide parties with some advantage, for example, making them focus on the real issues in dispute and avoiding unnecessary procedural steps otherwise applicable in the regular arbitral proceedings.¹⁴⁷⁵ Certainly, if a tribunal grants one party a significant, unjustified procedural advantage or refuses without justification to postpone or reschedule a hearing so that essential witnesses or irreplaceable counsel can be available, due process rights will be violated.¹⁴⁷⁶

In *Tube & Steel Corp. of Am. v. Chicago Carbon Steel Products*¹⁴⁷⁷ the US Court decided due process violation had occurred when the tribunal scheduled a hearing on a date that one party could not make, despite the fact that the parties had mutually agreed on another date. Again, even though fast-track procedures may not be a problem, the objectives of meeting shortened time limits increase the risks of the tribunal making an obvious error.¹⁴⁷⁸

¹⁴⁷¹ Dahlberg/Öhrström (2010) p. 539

¹⁴⁷² 384 N.Y.S.2d 801 (N.Y. App. Div. 1976), aff'd, 397 N.Y.S.2d 987 (N.Y. 1977)

¹⁴⁷³ Baizeau (2009)

¹⁴⁷⁴ Japaridze (2008) p. 1430

¹⁴⁷⁵ Böckstiegel (1999) p. 52

¹⁴⁷⁶ Davis/Lagace/Volkovitsch (1993) p.81

¹⁴⁷⁷ 319 F.Supp. 1302, 1304 (S.D.N.Y. 1970)

¹⁴⁷⁸ Lamm (2009)

Another ground for the denial of due process in FTA is the arbitrator's improper exclusion or admission of evidence.¹⁴⁷⁹ In *Gervant v. New England Fire Ins. Co.*,¹⁴⁸⁰ the court held that: "*In arbitration proceedings the rule is that 'If the arbitrators refuse to hear evidence pertinent and material to the matter in controversy, it is unquestionably such misconduct as will vitiate an award in a court of equity.'*"¹⁴⁸¹

In *Chilton v. Saga Holidays plc*,¹⁴⁸² the English Court of Appeal set aside an award where the arbitrator refused to allow the respondent's solicitor to cross-examine the claimants on the grounds that the claimants were unrepresented.

A number of courts have decided that unreasoned awards violate due process rights, where this has affected the parties' rights to be heard. In *Judgment of 22 March 2007, DFT 4P.172/2006* the Swiss Federal Tribunal held that the tribunal's failure to address the party's lengthy legal submissions in its award, or to provide any indication that these submissions were considered, violated the party's right to be heard.

Understandably, some parties reject FTA, considering that the risk is too great that due process rights will not be respected and that the award will not be final and enforceable.¹⁴⁸³ However, if parties need some manner of protecting themselves against this risk, they can contract for a second round of arbitration as their mechanism for an appeal.¹⁴⁸⁴ In England, for instance, adjudicators' decisions on construction disputes can be reviewed by courts to reduce due process concerns.¹⁴⁸⁵ A post-award process of appellate arbitrators can be suggested to review an FTA award before a final award is issued.¹⁴⁸⁶ This would indeed increase arbitration's expense and duration

¹⁴⁷⁹ Habegger, P. (2009)

¹⁴⁸⁰ 306 N.Y. 393 (N.Y. App. 1954)

¹⁴⁸¹ *Ibid* See also Born (2009) p.2585 fn.182

¹⁴⁸² [1986] 1 All E.R. 841

¹⁴⁸³ Kurkela/Turunen (2010)

¹⁴⁸⁴ Knull/Rubins (2000) p.531-607

¹⁴⁸⁵ Jenkins/Stebbing (2006) p. 105-126

¹⁴⁸⁶ Ginkel (2003) p. 192

contrary to the overriding objectives of FTA, but it would provide the review some parties' desire without stepping back to regular arbitration proceedings.

Even though fast-track procedures should respect fundamental due process rights and many court decisions support arbitrators who apply fast track,¹⁴⁸⁷ the many court decisions that go against FTA awards show that parties still face a compromise between the speed they want and the legal security they need.

5.2.2 The impact of Mandatory Procedural Requirements on FTA

The parties' freedom to agree upon FTA procedures and the tribunal's discretion to adopt such procedures are subject to the mandatory requirements of applicable national and international law.¹⁴⁸⁸ Under most developed arbitration statutes, mandatory requirements are limited to due process rights and the procedural regularity of the FTA process. However, it is often difficult to identify what precisely constitutes a mandatory procedural requirement of the arbitral seat (or elsewhere) even for a lawyer educated in the country in question.¹⁴⁸⁹

Most national laws are silent on the question of parties' freedom to fast-track procedures in ICA.¹⁴⁹⁰ However, mandatory rules of some states interfere with parties' autonomy to agree upon arbitral procedures¹⁴⁹¹ and instead, impose specific, mandatory procedural regimes for the FTA proceedings.

¹⁴⁸⁷ See i.e. Swiss Supreme Court decision dealing with an FTA award rendered under Article 42 of the SCAI Rules in 4A_294/2008 of 28 October 2008, ASA Bull. 1/2009, pp. 144-152.

¹⁴⁸⁸ UNCITRAL Model Law, Article 34(2)(iv); German Arbitration Act of 1998, Article 1059 (2)(d); Austrian CCP of 2006, Article 611 (2)(iv); Australian IAA of 2011, Section 16

¹⁴⁸⁹ Caron/ Pellonpää/Caplan (2006) p. 80

¹⁴⁹⁰ Lau/Horlach (2010) p.121

¹⁴⁹¹ Blessing (1997) pp. 23-40 discussing the legal effect of mandatory rules which in the wide sense include mandatory rules (i) of an internal or domestic mandatory nature, (ii) those of a foreign legal order, (iii) those of an international character, claiming application irrespective of, any law chosen or determined as applicable, and (iv) those pertaining to a truly supranational order

For example, until recently, arbitration statutes in some Latin American states imposed detailed procedural time tables that arbitral tribunals were obliged to follow.¹⁴⁹² Other states impose procedural requirements imported from local litigation.¹⁴⁹³ For example, the *Egyptian Evidence in Civil and Commercial Matters Act of 1968* requires witnesses to personally attend the hearings and to testify orally.¹⁴⁹⁴ The new Egyptian Arbitration Act repealed the former arbitration chapter of the Code of Civil Procedure but left the Evidence Act untouched.¹⁴⁹⁵ Furthermore, one can infer from the conjunction of Articles 25, 33(4) and 37(1) of the of the Arbitration Act that personal presence of the witness and his oral testimony is still required, if no contrary agreement is expressly made.¹⁴⁹⁶ Thus unwary parties might agree to a clause without knowing about Egypt's law and subsequently find they cannot submit written witness statements without oral testimony.

In some other national laws there are mandatory procedural deadlines which might restrict FTA provisions. For example, in the Republic of Armenia, Article 20 of the Law on Arbitration provides that the arbitration tribunal must in a proper manner notify the parties about the place and time of the court's session.¹⁴⁹⁷ What is meant by 'in a proper manner' is defined in Article 17 which specifies that the respondent should be given thirty days to respond to the statement of claim presented to him by the plaintiff.¹⁴⁹⁸ Further, Article 40(3) of the Armenian Law on Arbitration advises that *"the issuance of the writ of execution of an award may be refused if the party against whom the award was entered was not notified in a proper manner about the time and place of*

¹⁴⁹² See, e.g., Guatemalan Code of Civil and Commercial Procedure, Articles 287 and 288; Organic Law of the Judiciary (Chile), Law 7421 of 15 June 1953, Article 223. The residual effects of this legislative approach remain even in France's current domestic arbitration legislation. French NCPC Articles 1456 (six month time limit), 1460 (judicial procedures mandatorily applicable in domestic arbitration).

¹⁴⁹³ Tunisian Arbitration Code (Promulgated by Law No. 93-42) Art. 7; McConaughay/Ginsburg (2009) pp. 449-464 (Vietnam's Ordinance on Commercial Arbitration, 2003 guarantees party autonomy, abandoning out-dated procedural requirements).

¹⁴⁹⁴ Egyptian CCP of 1968

¹⁴⁹⁵ Law No. 27 For 1994 Promulgating The Law Concerning Arbitration in Civil and Commercial Matters

¹⁴⁹⁶ *Ibid*

¹⁴⁹⁷ Armenian Arbitration Act of 2006, Article 20

¹⁴⁹⁸ Armenian Arbitration Act of 2006, Article 17

the proceedings".¹⁴⁹⁹ Therefore, an FTA procedure cannot provide a time limit shorter than 30 days for the statement of defence if Armenian law is to be applied.

Similarly, the Algerian mandatory fifteen-day time limit for the answer would void a shorter time limit set by the parties. Article 1022 of the new Algerian Code of Civil and Administrative Procedure requires each party to set out its defence and supply the relevant documents at least fifteen days before expiry of the arbitration time limit, whether fixed by agreement or by law.¹⁵⁰⁰ Thus, any parties agreeing to a fast-track arbitration to be conducted under Algerian law should refrain from setting a time limit shorter than fifteen days for the rendering of the award, otherwise the award will face a real risk of being set aside.¹⁵⁰¹

A related argument could be made at the enforcement stage under I(3) of the NYC, which indicates that state signatories can limit the application of the Convention to those proceedings that are 'commercial' in nature. Although the vast majority of signatories have not adopted that particular reservation, a significant number (45 of 149) currently have.¹⁵⁰² The term 'commercial' has typically been interpreted broadly so as to encourage enforceability of awards under the Convention.¹⁵⁰³ Indeed, Gary Born has stated that the term should be given 'a liberal, expansive definition that includes all manner of business, financial, consulting, investment, technical and other enterprise'.¹⁵⁰⁴ However, a few national court decisions have adopted what appears to be a narrow definition of "*commercial relationship*" under the Convention.¹⁵⁰⁵ For example,

¹⁴⁹⁹ Armenian Arbitration Act of 2006, Article 40(3)

¹⁵⁰⁰ Algerian Code of Civil and Administrative Procedure, Article 1022. See also Article 1018 (three months from date of submission to arbitration, unless otherwise agreed, the arbitral tribunal may, for good reasons, provide for an extension of the term by two months at the most.)

¹⁵⁰¹ Born (2011) p.733-734

¹⁵⁰² See at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

¹⁵⁰³ Born (2009) p. 260-264 (but noting problems could arise with regard to 'public law' statutory rights (such as those involving concession agreements or other contracts involving elements of national sovereignty) and consumer transactions or employment law).

¹⁵⁰⁴ *Ibid*

¹⁵⁰⁵ *BV Bureau Wijsmuller v. United States of America*, 1976 A.M.C. 2514 (S.D.N.Y. 1976) (claims for salvage of US military vessel not commercial).

an Indian court held that agreements concerning the transfer of technology were not “commercial” under Indian law or the Convention.¹⁵⁰⁶ Likewise, the Tunisian Cour de Cassation held that a contract for the architectural design in a town-planning program was not commercial.¹⁵⁰⁷ To the extent that states wish to exclude certain types of transactions, the legislature can adopt specific substantive rules regarding the non-arbitrability of those disputes.¹⁵⁰⁸ The better approach to Article I(3) was adopted by France in 1989, which withdrew the commercial reservation that it made when originally ratifying the NYC.¹⁵⁰⁹

Problems do occasionally arise as a result of the relevant country not having acceded to the NYC¹⁵¹⁰ or (more difficult to identify) not properly incorporating the provisions of the NYC into its domestic law, even where it has acceded.¹⁵¹¹

Bearing in mind that parties have a reasonable expectation that national courts should expedite arbitration proceedings, it is important to discover how courts can be helped in fast-tracking international commercial disputes. This requires knowing the attitude of the courts toward the FTA process at the location of the forum. Are the courts there inclined to take a hands-off attitude to fast-track proceedings? Or will they actively intervene in the fast-track process to ensure that parties respect the mandatory rules of law?

¹⁵⁰⁶ *RM Inv. & Trading Co. Pvt Ltd (India) v. Boeing Co.*, XXII Y.B. Comm. Arb. 710 (Indian S.Ct. 1994) (1997); *India Organic Chemicals, Ltd v. Chemtex Fibres Inc.*, (1978) All India Rep. 106 (Bombay High Court)

¹⁵⁰⁷ Judgment of 10 November 1993, *Taieb Haddad and Hans Barett v. Societe d'Investissement Kal*, XXIII Y.B. Comm. Arb. 770 (Tunisian Cour de cassation) (1998).

¹⁵⁰⁸ Greenawalt (2007) p.103

¹⁵⁰⁹ French Decree No. 90-170 of 16 February 1990, Official Journal of 23 February 1990

¹⁵¹⁰ See, for instance, *Texaco Pananma Inc. v Duke Petroleum Transport Corp.*, 3 September 1996 95 Civ. 3761 (LMM); International Arbitration Report 11(9) (1996) pp. D1 – D2, ‘The New York Convention of 1958 relied on by the respondent does not apply, since sic respondent is a Liberian corporation and Liberia is not a signatory party to that Convention’.

¹⁵¹¹ For example, Pakistan was an early signatory to the New York Convention but did not amend its domestic law to reflect its terms until 14 July 2005.

In *Petro-Canada v. Alberta Gas Ethylene Co.*¹⁵¹² a party received indications from the tribunal that the award would not be favourable to him. The award was to be rendered shortly after 08 March 1991, the contractually agreed date. The party immediately applied to the court on 11 March 1991 seeking to enforce the party agreed time limit for the issuance of the award. The successful claim meant that as the award was rendered after the contractual deadline, it was beyond the tribunal's jurisdiction and the award was therefore unauthorized and invalid. The court found that "*it is not for the courts or the Arbitral tribunal to question a party's motivation for exercising a contractual right.*"¹⁵¹³

Finally, even if *lex arbitri* employs a hands-off approach to fast-track proceedings, whether the award will be enforced in another country will depend on how the enforcing courts look upon the fast-track process and its review by the courts at the original location.¹⁵¹⁴ There is thus considerable risk if the arbitral forum does not have substantial experience in supporting fast-track procedures, or if the place of enforcement is located where the courts have not demonstrated a favourable attitude toward FTA.¹⁵¹⁵

¹⁵¹² *Petro-Canada v. Alberta Gas Ethylene Co.* (1992, January 28). Alberta Court of Appeal, Harradence, Stratton and Fraser JJ., A., 1 Alta. L.R. (3d) 380, 127 A.R. 128, 20 V.A.C. 128.

¹⁵¹³ *Ibid* 121 AR 199, 205

¹⁵¹⁴ Daly/Scheller (2010) p. 67

¹⁵¹⁵ Koch (2009) p. 273 See also Paulsson (1998) p. 19

5.2.3 International enforceability of FTA awards under the NYC

FTA is most useful if it provides an award that is binding and easy to enforce internationally.¹⁵¹⁶ In 2007 Berg observed that only 70 arbitral awards were refused enforcement although 700 applications were made to refuse enforcement under the NYC.¹⁵¹⁷ A failure rate of only 10% can be considered a successful achievement for the interpretation of international arbitral proceedings under the NYC. But do the grounds of challenge to awards contained in Article V of the NYC limit or prohibit the application of FTA?¹⁵¹⁸

5.2.3.1 A potential conflict between party autonomy and fast-track procedures

The single most likely reason for FTA to produce an award that is not enforceable is an objection that arises under Article V (1)(d) of the NYC. This provision allows a national court to refuse enforcement of a foreign award upon proof that *'the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place'*.¹⁵¹⁹

Issues can arise where an arbitral tribunal does not wish to accept a fast-track procedure agreed upon by the parties.¹⁵²⁰ For example, the parties may wish to permit limited document discovery, followed by a one day evidentiary hearing, while the arbitral tribunal firmly believes that extensive discovery and a 1 week hearing is appropriate.¹⁵²¹ In these circumstances, may the tribunal

¹⁵¹⁶ Broichmann/Ernemann (2010)

¹⁵¹⁷ Berg (2007) p. 35

¹⁵¹⁸ Verbist (2008) p. 692 (The author states that no less than 136 reported court decisions were found worldwide during the last 35 years where due process was raised as a ground to oppose enforcement, but the due process ground caused State courts to refuse enforcement in 14 cases only.)

¹⁵¹⁹ NYC Article V(1)(d)

¹⁵²⁰ Born, G. (2009) p. 260-264

¹⁵²¹ Veeder (2008)

“reject” the parties' agreement, or is it bound to implement the parties' mutually-agreed fast-track procedures?¹⁵²²

Most courts have emphasized that an arbitral tribunal's interpretation and application of the parties' agreed arbitral procedures will not be subject to rigorous judicial second-guessing: Article V(1)(d) was not “*intended ... to permit reviewing courts to police every procedural ruling made by the arbitrator and to set aside the award if any violation of the party agreed procedures is found.*”¹⁵²³

However, the US Supreme Court in *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*¹⁵²⁴ did not accept this approach. In this case the court vacated the arbitration award under § 10(a)(4) of the Federal Arbitration Act (FAA) on the ground that the arbitrator exceeded his powers while interpreting and enforcing an arbitration agreement.

Whether one views the reliance on state law as a means of determining party intent (as suggested in *Stolt-Nielsen*) or as a separate default mechanism under the second clause of Article V(1)(d) regarding ‘*the law of the country where the arbitration took place*’, the analysis is the same under the NYC.¹⁵²⁵ Neither Article V(1)(d) nor any other provision of Article V permits non-

¹⁵²² Carter (1995) p.31; Littman (1997) p.269; Rokison (1998) p. 361

¹⁵²³ *Compagnie des Bauxites de Guinee v. Hammerrills, Inc.*, [1992] WL 122712 (D.D.C. 1992). See also *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All E.R. (Comm.) 315 (Q.B.) (rejecting defense to recognition based on failure of arbitrators to comply with CIETAC Rules, as parties' agreed procedures, under Article V(1)(d)); Judgment of 14 April 1998, *SpA Ghezzi v. Jacob Boss Söhne*, XV YBCA 450 (at 453-454) (Federal Supreme Court, Germany)(1990) (rejecting argument that failure to render award within ICC Rules' deadline of six months was grounds for non-recognition under Article V(1)(d), on grounds that ICC Rules provide for extensions, which were granted, and do not provide for termination of arbitrators' mandate after six months); Judgment of 20 October 1998, XXIX YBCA 673 (Oberlandesgericht Dresden) (2004) (no violation of parties' agreed arbitral procedures where, in award debtor's default, arbitral institution applied its rules providing for institutional appointment of co-arbitrator); Judgment of 30 May 2006, XXXII YBCA 406 (Italian Corte di Cassazione) (2007) (failure of arbitrator to declare proceedings closed, as required by institutional rules, “is only a defect in the arbitral proceedings which may be relied on, if at all, in the foreign legal system through the means of recourse available therein”); *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296 (D.C. Cir. 2005) (apparently holding that arbitrators' determination that arbitration agreement's procedures had been properly followed was binding).

¹⁵²⁴ 130 S.Ct. 1758, 1768 (2010).

¹⁵²⁵ Kröll/Mistelis/Viscasillas/Rogers (2011) See also Lew (2007) p. 455

recognition of an award merely because the arbitral tribunal gave effect to the parties' agreed arbitral procedures rather than the law of the arbitral seat.¹⁵²⁶ On the contrary, Article V(1)(d) grants priority to the parties' procedural agreement and provides for the non-recognition of awards where the arbitral tribunal gives effect to mandatory local law rather than the parties' agreed arbitral procedures.¹⁵²⁷ As discussed above, both arbitral tribunals and national courts have sought to avoid conflicts between mandatory local laws and agreed FTA procedures, typically by interpreting each consistently with the other.¹⁵²⁸ Nonetheless, where a conflict is unavoidable, it is the parties' agreed arbitral procedures that prevail over local mandatory law for purposes of Article V(1)(d).¹⁵²⁹

According to Born, provided that FTA proceedings are based on the parties' consent either *express* or *implied*, Article V(1)(d) of the NYC would not be implicated and conducting a fast-track procedure should not provide grounds for denying recognition to an award'.¹⁵³⁰ In one case, the Court of Appeal of Bremen dismissed the respondent's argument under Art. V (1)(d) NYC that the arbitral proceedings were not in accordance with the law of the country where arbitration took place, because the arbitral tribunal did not grant the respondent's request for an oral hearing and disregarded its offer of new evidence.¹⁵³¹ The court held that the arbitral tribunal acted in accordance with the Institutional Arbitration Rules, which applied as a consequence of the parties' agreement to refer their disputes to arbitration before that body and under which a documents only arbitration could be conducted.¹⁵³²

Parties may also argue that fast-track proceedings are improper in cases where the parties have agreed to proceed under a particular set of regular arbitral rules that do not specifically contemplate FTA provisions but the

¹⁵²⁶ Horvath (2011) p. 270

¹⁵²⁷ Kronke/Nacimiento/Otto/Port (2010) p. 285

¹⁵²⁸ Haas (2009) para 65.

¹⁵²⁹ *Rederi Aktiebolaget Sally v. S.r.l. Termarea* (ItalyNo.32), Cortedi Appello of Florence, 13 April 1978

¹⁵³⁰ Born (2009) p.2764

¹⁵³¹ Judgement of 30 September 1999, XXXI YCBA 640 (Hanseatisches Oberlandesgericht) (2006)

¹⁵³² *Ibid* pp. 640-651

institution has nevertheless applied FTA.¹⁵³³ According to Kreindler it is doubtful whether an award arising out of implicit application of FTA proceedings (unless parties *explicitly* choose fast-track) would be enforceable under the NYC, even in cases where the relevant law or arbitral rules give the necessary authority to a court, arbitrator or appointing authority.¹⁵³⁴ Julian D.M Lew's view on FTA similarly appears to be based on a strict reading of party autonomy that institutions cannot fast-track regular arbitration without express party agreement.¹⁵³⁵ Although criticised by other commentators,¹⁵³⁶ this view is strongly embedded within the international arbitral community.¹⁵³⁷ In practice, it is clear that the parties' procedural autonomy is paramount and that institutions and arbitrators under institutional arbitration rules will almost always seek agreement by the parties on fast-track procedural issues and will only in the rarest of cases accept implicit application of FTA proceedings.¹⁵³⁸

The split of opinion between Born and Kreindler regarding the international enforceability of FTA awards without express agreement for fast-track procedures suggests that FTA awards will receive a similarly divided reception at the enforcement stage.¹⁵³⁹

Another area of concern involves the parties' ability to choose their own arbitrators, which is often considered a fundamental right in arbitration.¹⁵⁴⁰ The sanctity of this principle is reflected in Article V(1)(d) of the NYC, which explicitly protects the parties' agreements concerning the composition of the arbitral tribunal.

¹⁵³³ See supra p. 171-178 Section 4.4.6.3

¹⁵³⁴ Kreindler (1998) pp. 180-187

¹⁵³⁵ Lew/ Mistelis/Kröll (2003) p.548 ¶ 21-85

¹⁵³⁶ Derains (2003) pp. 25, 27, 33

¹⁵³⁷ Lynch (2003) pp. 72-74.

¹⁵³⁸ Zuberbühler/Muller/Habegger (2005) p. 355

¹⁵³⁹ Born (2009) pp. 185-187; Lew/Mistelis/Kröll (2003) pp. 70-81 ¶ 5-2; Lynch (2003) pp. 72-74.

¹⁵⁴⁰ Born (2009) p.1378

Difficulties can arise, however, when an attempt to expedite the appointment of a tribunal breaks down.¹⁵⁴¹ Whenever an agreed fast-track procedure is not followed, the composition of the tribunal will be improper. Such improper composition may arise in the initial composition or result from the treatment of challenges by the parties subsequent to the constitution of the arbitral tribunal.

The following examples illustrate cases in which improper composition was raised as a defence to enforcement and recognition under Article V(1)(d). In *Encyclopaedia Universalis SA v. Encyclopaedia Britannica, Inc.*,¹⁵⁴² the parties' arbitration agreement was violated when the two co-arbitrators reached deadlock and the appointing authority was unable to appoint a presiding arbitrator. In *Rederi Aktiebolaget Sally v. Srl Termarea*¹⁵⁴³, the arbitral tribunal comprised two arbitrators and the Italian court refused to recognize its award because the arbitration agreement provided for a three-person tribunal. In contrast, the US court in *Al Haddad Bros. Enter. Inc. v. MS Agapi*¹⁵⁴⁴ recognized the award made by the sole arbitrator, pursuant to the English Arbitration Act, even though the parties' agreement provided for three arbitrators.

Numerous solutions have been proposed to ensure expedited appointment of arbitrators.¹⁵⁴⁵ The most popular has been to allow the appointing authority to name the sole arbitrator, either immediately or once it is clear that the parties cannot agree on the procedure to be used.¹⁵⁴⁶ This method, which is considered to protect the equality of the parties, applies equally well to FTA. Therefore, enforcing courts will likely be able to rely on existing practice and authority when considering objections to a FTA award arising out of the appointment of arbitrators. In one case, where the agreement specified the

¹⁵⁴¹ See e.g., *BKMI Industrieranlagen GmbH v. Dutco Construction Co. Ltd* (1990) XV YBCA 124; Gaillard/Savage (1999) pp. 47-49 Sections 92-93

¹⁵⁴² 403 F.3d 85, 90-92 (2d Cir. 2005)

¹⁵⁴³ Judgment of 13 April 1978, *Rederi Aktiebolaget Sally v. Srl Termarea*, IV YBCA 294, 294-95.

¹⁵⁴⁴ 635 F.Supp. 205 (D. Del. 1986); Judgment of 3 June 1982, *X v. Naviera YSA*, XI YBCA 527 (Spanish Tribunal Supremo) (1986); Judgment of 24 February 1994, *Ministry of Public Works v. Société Bec Frères*, XXII YBCA 682 (Paris Cour d'appel) (1997)

¹⁵⁴⁵ *Kronke/Nacimiento/Otto/Port* (2010) p. 289

¹⁵⁴⁶ Frick (2001) p. 234;

appointing authority but the tribunal was appointed by a different authority, the court rejected the argument that the composition was out of line with the agreement because the arbitrator was appointed by the institutional appointing committee once the parties could not reach agreement on an arbitrator.¹⁵⁴⁷ Similarly, if the agreement or the local law requires the nominated arbitrator to have certain qualifications and the arbitrator is missing those qualifications, the tribunal would be improper. The same principle applies to the number of arbitrators.¹⁵⁴⁸ Some FTA Rules allow the institution to appoint the arbitrator without providing parties an opportunity to agree a choice. This may increase speed but makes FTA procedure less consensual and more open to challenge under the NYC.¹⁵⁴⁹

However, not every deviation from the originally agreed-upon fast-track procedure necessarily leads a court to find that refusal of enforcement or recognition is warranted under Article V(1)(d). Rather, the court must examine whether the parties have (perhaps tacitly) modified the rules of arbitration.¹⁵⁵⁰ Similarly, an irregularity in the composition process does not necessarily lead to a refusal of enforcement of the award under Article V(1)(d) if a party later (tacitly) consents to the composition of the arbitral tribunal.¹⁵⁵¹

¹⁵⁴⁷ Judgement of 31 May 2007, XXXIII YBCA 524 (Celle Court of Appeal, Germany) (2008)

¹⁵⁴⁸ Judgement of 24 February 1999, XXVIII YBCA 248 (Bavarian Supreme Court, Germany) (2003)

¹⁵⁴⁹ Judgement of 18 September 1978, Gaetano Butera v. Pietro e Romano Pagnan, IV YBCA 296, (Corte Di Cassazione, Italy) (1979) (“the conformity of the composition of the arbitral tribunal with the law of the country where the arbitration takes place ... must be observed for the enforcement of the award only if the parties have not provided for a different composition of the arbitral tribunal.”).

¹⁵⁵⁰ Judgement of 20 February 2001, XXVIII YBCA 261 (Dresden Court of Appeal, Germany) (2003), where both parties deviated from the arbitration agreement by naming arbitrators without institutional membership although the arbitration agreement required such membership. The court deduced from the parties' failure to object to the lack of membership a tacit modification of the rules of arbitration.

¹⁵⁵¹ See Int'l Arb. L. Rev. 2006, N-61 (Naumburg Court of Appeal, Germany), where the court considered the conclusion of the contract with the arbitrator as consent to the composition of the arbitral tribunal.

5.2.3.2 Lack of Proper Notice

Notice of any procedure that affects a party's legal entitlements is another fundamental right in arbitration and the NYC explicitly reflects that principle in Article V(1)(b). It states: *"recognition and enforcement of the award may be refused"*¹⁵⁵² on proof that *"the party against whom the award is invoked was not given proper notice of the arbitrator or of the arbitration proceedings."*¹⁵⁵³

This increases concerns that the award may annulled if a party claims it was given inadequate notice of the commencement of arbitration, or written submissions, or the hearing, or any other important steps in the FTA process.¹⁵⁵⁴

In Holargos Shipping Corp. v. Hierros Ardes S.A the supreme court of Spain denied recognition of an award under Article V(1)(b), because there was insufficient proof that the defendant had been notified of the appointment of the arbitrator. Furthermore, the arbitrator failed in his first notice to identify the disputed issues and gave the defendant only one week to present his defence.¹⁵⁵⁵ In contrast to the requirement of notice of the appointment of arbitrators, courts have found that parties need not be given notice regarding an extension of the arbitrator's mandate.¹⁵⁵⁶ Also the Swiss Court of Appeal held that there is no lack of procedural fairness where a party received an *"invitation to participate in arbitration in a 'comprehensible' language only 4 to 5 days before the start of the proceedings"*¹⁵⁵⁷

¹⁵⁵² NYC Article V (1)

¹⁵⁵³ NYC Article V(1)(b)

¹⁵⁵⁴ See, e.g., *Geotech Lizenz AG v. Evergreen Systems, Inc.*, 697 F.Supp. 1248, 1253 (E.D.N.Y. 1988); *Kanoria v. Guinness* 2006 2 All E.R. (Comm.) 413 (English Court of Appeal) (refusing recognition of award under Article V(1)(b): "a party to an arbitration is unable to present his case if he is never informed of the case that he is called upon to meet");

¹⁵⁵⁵ Judgment of 3 March 1982, IX YBCA 435 (Spanish Tribunal Supremo) (1984)

¹⁵⁵⁶ Judgment of 14 April 1998, SpA Ghezzi v. Jacob Boss Söhne, XV YBCA 450 (at 453-454) (Federal Supreme Court, Germany)(1990)

¹⁵⁵⁷ Judgment of 27 February 1989, XVII YBCA 581, 583 (Basel-Stadt Court of Appeal) (1992)

Courts are reluctant to require formal compliance with notice provisions if there is evidence that a party had in fact received notice.¹⁵⁵⁸ In two separate cases, Mexican courts have refused to require personal service - as required by Article 605 No. IV of the Mexican Code of Civil Procedure - where the applicable ICC and AAA rules allowed service by mail and the defendants had acknowledged service by such means.¹⁵⁵⁹ The jurisprudence of the Chilean Supreme Court has evolved similarly to accept notice given in accordance with the relevant contractual provisions and arbitral institution rules, instead of requiring strict compliance with domestic service procedures.¹⁵⁶⁰ Institutional FTA Rules are therefore relatively straightforward. Most of them pose few or no problems because arbitral institutions adopt various precautions in relation to managing notices in FTA so as to avoid problems at the recognition or enforcement stage.¹⁵⁶¹

The drafters of Article 24.2 of the UNCITRAL Model Law have made clear that notice of any meeting of the tribunal must be both sufficient and provided in advance of the proceedings.¹⁵⁶² Courts have generally not imposed restrictions on parties' autonomy to agree specific time limits.¹⁵⁶³ but have rather focused on the parties' factual ability to have participated in the arbitration, even where time limits have caused the parties considerable inconvenience.¹⁵⁶⁴ However, an Italian court held that it must always ascertain

¹⁵⁵⁸ Bianchi (2007) (citing *Union Européenne de Gymnastique v. Multipole Distribuidora de Filmes Ltd.* (decided Apr. 19, 2006) (Superior Court of Justice, Brazil)).

¹⁵⁵⁹ *Press Office S.A. v. Centro Editorial Hoy S.A.*, (decided 1977), IV YBCA 301 (18th Civil Court of First Instance for the Federal District of Mexico, Mexico)(1979); *Malden Mills Inc. v. Hilaturas Lourdes S.A.* decided 1977), IV YBCA 302 (Court of Appeals for the Federal District of Mexico, Mexico) (1979)(also refusing objections based on letters rogatory).

¹⁵⁶⁰ *Quote Food Products B.V. v. Sociedad Agroindustrial Sacramento Ltd.*, Jul. 5, [1996] RDJ (1999), 2-1 82 (Supreme Court, Chile).

¹⁵⁶¹ Waincymer (2010) p. 23

¹⁵⁶² UNCITRAL Model Law, Article 24(2)

¹⁵⁶³ See, e.g., UNCITRAL Model Law, Article 34(2)(1)(ii); German ZPO, Article 1059(2)(1)(b) (allowing award to be set aside where applicant shows "he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case"); Austrian ZPO, §611 (award may be annulled where "a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was for other reasons unable to present his case"); Japanese Arbitration Law, Article 44(1)(iii) (award may be annulled where "party ... was not given notice as required by the provisions of the laws of Japan")

¹⁵⁶⁴ Judgment of 27 January 1986, XII YBCA 496 (Italian Corte di Cassazione) (1987) ("the Court of Appeal had rightly considered that the award-debtor had been informed by the award-creditor of the

“discretionally and according to prudent judgment,” whether the defendant has been notified of the proceedings against him in due time, so that he can be able to present his case, even if the period of notice complies with the conditions of the foreign law governing the arbitral proceedings.¹⁵⁶⁵ Interestingly, institutional FTA Rules have provided increased protection to ensure that parties receive timely notice of the FTA proceedings to reduce possible later intervention of national courts.¹⁵⁶⁶ Furthermore, the parties are often consulted by the institution before making a decision on applying for FTA over regular arbitration, which provides yet another level of assurance that notice has been properly given to the parties.¹⁵⁶⁷

The party objecting to enforcement under Article V(1)(b) has the burden of proving this ground for refusal exists.¹⁵⁶⁸ Accordingly, a party alleging lack of notice may be asked to prove a negative, that is, that it did not receive notice of the hearing.¹⁵⁶⁹ In order to increase the scope for the wider application of FTA court approaches to notice need to be standardised both to improve the efficiency of fast-track procedures and to increase the enforceability of FTA awards. Without such harmonization it is wise to consider FTA only if all of the parties, the *lex arbitri* and the place of enforcement are from countries that permit expedited notices.

Since national legislation regarding notice varies, the assistance of local counsel is always recommended. The situation would be helped by establishing an ‘approved’ list of countries and countries’ courts which are favourable to FTA so that parties’ trust for the effective conduct of FTA can be

arbitration in previous correspondence, that it had received the notice already on 24 October 1981, and that a period of 20 days for notifying a hearing was adequate considering the award-debtor's international experience and the modern means of communication.”);

¹⁵⁶⁵ *Bauer & Grobmann OHG v. Fratelli Cerrone Alfredo e Raffaele*, decided 1982), X YBCA 461 (Naples Court of Appeal, Italy), (1985).

¹⁵⁶⁶ See supra p. 195-197 Section 4.5.1.5

¹⁵⁶⁷ Najjar (2010)

¹⁵⁶⁸ *DIST Corporation v. Cosmos Internacional S.A.* (decided Oct. 30, 1998) (Lima Superior Court of Justice, Chamber of Abbreviated Procedures, Peru),

¹⁵⁶⁹ *Bezirksgericht and Obergericht Zürich* (decided 2003), XXIX YBCA 819,826 (Zurich Court of First Instance and Zurich Court of Appeals, Switzerland).(2004)

increased, and those countries who are not yet in the list can be encouraged to improve their arbitration legislation to favour expedited notices in arbitration.¹⁵⁷⁰

5.2.3.3 Inability to present one's case

Another significant objection to the enforcement of FTA awards under Article V(1) of the NYC falls under that portion of subsection (b) which indicates '*recognition and enforcement of the award may be refused*' on proof that '*the party against whom the award is invoked was ... unable to present his case*'. This language can be interpreted in two ways, either requiring a '*full opportunity*' to present one's case or possibly only a '*reasonable opportunity*' to do so.¹⁵⁷¹ Regardless of which definition is used, problems can arise in FTA where parties agree to fast-track procedures but conducting those procedures results in due process being prejudiced.¹⁵⁷²

A primary cause for objection is a pre-dispute FTA agreement that denies the right to be heard in oral proceedings.¹⁵⁷³ A tribunal's denial of an oral hearing in order to respect the parties' FTA agreement, when an oral hearing is requested by one of the parties after the dispute, would in principle be grounds for non-recognition of the resulting award.¹⁵⁷⁴ In *Generica Ltd v. Pharm. Basics, Inc.*¹⁵⁷⁵, the US Court observed that a hearing on the evidence is part of '*the minimal requirements of fairness*'.

However, in FTA, documents only arbitrations are customary.¹⁵⁷⁶ Many FTA rules explicitly provide that a decision may be rendered without an oral hearing. In these instances, most national courts have rejected arguments

¹⁵⁷⁰ Dahlberg/Öhrström (2010) p. 543

¹⁵⁷¹ Lew/ Mistelis/Kröll (2003) p.711 ¶26-87.

¹⁵⁷² Oberlandesgericht Hamburg (1975), II YBCA 241 (1977); *Apex Tech Investment Ltd v Chuang's Development (China) Ltd* 1996 2 HKLR 155.

¹⁵⁷³ Caron/ Pellonpää/Caplan (2006) p. 606

¹⁵⁷⁴ Born (2009) p.1832

¹⁵⁷⁵ 125 F.3d 1123, 1130 (7th Cir. 1997)

¹⁵⁷⁶ Hunter, M., & Redfern, A. (2004) ¶6-104

that such procedures are necessarily improper or inadequate.¹⁵⁷⁷ However, it is unclear whether an advance agreement to a documents only arbitration would be valid where it subsequently transpired that live testimony was critical to a reasoned evaluation of the parties' claims.¹⁵⁷⁸ In *Muyldermans v Belgium, App.*¹⁵⁷⁹ it was held that an oral hearing may be required where the case concerns “*the personal behaviour of a party*”.¹⁵⁸⁰

Other issues which can amount to a ground for challenge of an FTA award include the fact that a party has not been able to participate in the taking of evidence or in document disclosure proceedings,¹⁵⁸¹ that a party has been denied the right to introduce certain evidence,¹⁵⁸² or to comment on an expert's report submitted to the tribunal,¹⁵⁸³ or that the standards of adversarial proceedings adopted by the tribunal deprived a party of its fundamental right to defence.¹⁵⁸⁴

In one case the Austrian Supreme Court held that in FTA proceedings a tribunal's rejection of certain evidence brought by the defendant did not constitute a due process violation; nonetheless, if the arbitral tribunal had based its decision on facts and evidence that the defendant had no opportunity to contest, such omission would have been a due process violation.¹⁵⁸⁵

¹⁵⁷⁷ See, e.g., *Intercarbon Bermuda, Ltd v. Caltex Trading and Transp. Corp.*, 146 F.R.D. 64, 72 (S.D.N.Y. 1993); *Judgment of 30 July 1998*, XXV YBCA 714 (Hanseatisches Oberlandesgericht Hamburg) (2000)

¹⁵⁷⁸ Born (2009) p.2746

¹⁵⁷⁹ 12217/86 (EHR Comm. 1990)

¹⁵⁸⁰ *Ibid*

¹⁵⁸¹ See, e.g., *Polytek Engineering Co Ltd v Hebei Import and Export Corp.*, (1998) XXIII YBCA 666 (High Court Hong Kong, 16 January 1998).

¹⁵⁸² See, e.g., *US, Iran Aircraft Industries v AVCO Corporation*, 980 F 2d 141, (1993) XVIII YBCA 596 (2d Cir, 1992);

¹⁵⁸³ See, e.g., *Judgement of 15 January 1975, Paklito Investment Ltd v Klockner East Asia Ltd*, XIX YBCA 654 (Supreme Court of Hong Kong)(1994)

¹⁵⁸⁴ See, e.g., *Judgement of 3 April 1975, US firm v German firm*, II YBCA 241(Oberlandesgericht Hamburg, Germany) (1977).

¹⁵⁸⁵ *Judgement of 31 March 2005*, XXXI YBCA, 583 (Supreme Court, Austria) (2006)

In *G.W.L. Kersten & Co. BV v. Société Commerciale Raoul-Duval et Cie*¹⁵⁸⁶ a Dutch court refused enforcement in a fast-track case in which both the claimant and the arbitral tribunal had failed to forward documents submitted by the claimant to the defendant, even though the claimant had briefly informed the defendant of the allegations contained therein by telex and the defendant had presented its defence.¹⁵⁸⁷

In another Dutch case, documents were submitted after the hearing and not sent to the defendant. The Dutch court determined that, in order for an award to be enforced, the defendant must have explicitly agreed not to respond to any new, unknown documents submitted by the claimant to the tribunal after the hearing. The court found it to be insufficient that the award stated that documents submitted after the hearing had not been taken into consideration.¹⁵⁸⁸

The shortened period for appearing before the arbitrator can form an obstacle for the recognition and enforcement of an award under Art. V of the Convention if the aggrieved party can prove that the period has in fact precluded him from the exercise of his right of defence.¹⁵⁸⁹ In one case, the Italian high court remanded to lower courts to determine whether an arbitral tribunal's decision to schedule the hearing in early September violated the respondent's right to be heard under Article V(1)(b).¹⁵⁹⁰ In this case parties were summoned on 11 August 1981 to appear before the Vienna arbitral tribunal. The date scheduled for the hearing was 8 September 1981. The Court of Appeal held that this notice period was sufficient and reasoned inter alia that commercial activities cannot be unilaterally suspended because one of the two States involved habitually concentrates vacations in the month of August. The Supreme Court accepted the Court of Appeal's reasoning but

¹⁵⁸⁶ *Gerechthof Den Haag (Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie BV*, decided 1997), YCA XXIII (1998), 731 (at 733-734) (The Hague Court of Appeal, Netherlands).

¹⁵⁸⁷ XIX YBCA 708 (at 709) (decided 1992)(Amsterdam Court of Appeal, Netherlands), (1994),

¹⁵⁸⁸ *Rice Trading (Guyana) Ltd. v. Nidera Handelscompagnie BV*, (decided 1997), XXIII YBCA 731 (at 733-734) (The Hague Court of Appeal, Netherlands), (1998)

¹⁵⁸⁹ Judgment of 28 January 1982, IX YBCA 423 (Italian Corte di Cassazione) (1984)

¹⁵⁹⁰ Judgment of 3 April 1987, XVII YBCA 529 (Italian Corte di Cassazione) (1992)

noted that there are legal provisions concerning this issue. Particularly, the Supreme Court noted that the Italian legal notice period is ninety days and that all time limits for proceedings before Italian courts are suspended between 1 August and 15 September, with certain exceptions (Law no. 742 of 7 October 1969). The Supreme Court held that this provision leads to a “thinning out” of all judicial activities, so that the party’s opportunity of defending itself may have been affected.

Although national courts have not used the due process exception to require parties to subject themselves to procedures different from those originally contemplated in the FTA agreement, the above case examples demonstrate that fast-track procedures can be risky.

5.2.3.4 Problems Regarding Public Policy

One of the most frequently invoked bases for refusing to recognize an international arbitral award is the “public policy” (or *ordre public*) exception.¹⁵⁹¹ Under Article V(2)(b) of the NYC, *‘recognition and enforcement of the award may ... be refused if the competent authority in the country where recognition and enforcement is sought finds that ... the recognition or enforcement of the award would be contrary to the public policy of that country’*.¹⁵⁹²

While not defined in the NYC,¹⁵⁹³ it is clear that the only relevant public policy is that of the state where enforcement is to take place.¹⁵⁹⁴ Although applicable under almost all leading international arbitration conventions and national arbitration legislation, the content of the public policy exception remains controversial as it gives rise to significant complexities. In the words of a

¹⁵⁹¹ Born (2009) p. 2827

¹⁵⁹² NYC Article V(2)(b)

¹⁵⁹³ Kurkela/Snellman (2005) p. 11. The International Law Association (ILA) attempted to define the concept of international public policy in two reports issued in 2000 and 2002. See International Law Association, Conference Report 2000 and Conference Report 2002 (‘ILA Final Report’), available at www.ila-hq.org/en/committees/index.cfm/cid/19; Mistelis (2002) p. 249.

¹⁵⁹⁴ Lew/ Mistelis/Kröll (2003) p. 712 ¶¶26-82.

leading practitioner, the exception has been interpreted erratically by the courts and is probably the most misused ground of all in Article V.¹⁵⁹⁵

Public policy concerns therefore have a significant impact on FTA, particularly when the country in which the arbitration takes place favours fast-track procedures but the public policy of the enforcing state discourages or even prohibits FTA proceedings.¹⁵⁹⁶

It is important to remember that domestic public policy concerns are not enough to justify non-enforcement of the FTA award.¹⁵⁹⁷ *‘Only violations of the enforcement state’s public policy with respect to ... international public policy ... is a valid defence.’*¹⁵⁹⁸ In *Parsons & Whittemore Overseas Co.*¹⁵⁹⁹ the US Court held that:

*“In equating ‘national’ policy with United States ‘public’ policy, the appellant quite plainly misses the mark. To read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention’s utility. Article V was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy.’ Rather, a circumscribed public policy doctrine was contemplated by the Convention’s framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.”*¹⁶⁰⁰

¹⁵⁹⁵ Paulsson (1996) p. 113

¹⁵⁹⁶ Davis/Smit/Brown/Affaki/et al. (1994) p.449

¹⁵⁹⁷ ILA Final Report paras. 10-11;

¹⁵⁹⁸ Lew, J. D. M., Mistelis, L., & Kröll, S. (2003) p. 720 ¶¶26-114.

¹⁵⁹⁹ 508 F.2d 974

¹⁶⁰⁰ *Ibid*

As another court put it:

*“the public policy of the State where the arbitral award is invoked is thus not the internal public policy of that country, but its international public policy, which is defined as being all that affects the essential principles of the administration of justice or the performance of contractual obligations.”*¹⁶⁰¹

However, not all commentators agree, with many emphasizing that the relevant public policy is that of the enforcement forum.¹⁶⁰² Objections based on public policy may be procedural or substantive, though both are intended to be construed narrowly under the NYC.¹⁶⁰³ In *Fotochrome, Inc. v. Copal Co.*, for instance, it was held that *“the ‘public policy’ limitation on the Convention is to be construed narrowly to be applied only where enforcement would violate the forum state’s most basic notions of morality and justice”*¹⁶⁰⁴.

5.2.3.4.1 *Procedural public policy*

When national courts have invoked public policy it has sometimes been on grounds of procedural irregularities (which could readily have been considered under Article V(1)(b) or (d)).¹⁶⁰⁵ In *Chrome Resources SA v. Léopold Lazarus Ltd*, the Swiss Federal Tribunal held that *“case law, nowadays well established, has recognized that public policy applies not only to the contents of the award but also to the procedure and composition of the Arbitral*

¹⁶⁰¹ Judgment of 24 November 1993, XXI Y.B. Comm. Arb. 617, 624 (Lux. Superior Court of Justice) (1996).

¹⁶⁰² Merkin, R. M., Flannery, L., & Barlow, L. & G. (2004) ¶19.58; Hunter, M., & Redfern, A. (2004) ¶10.52; Sheppard, Public Policy and the Enforcement of Arbitral Awards: Should There Be A Global Standard?, 1(2) Oil Gas and Energy Law Intelligence (2003).

¹⁶⁰³ Born (2009) pp. 2845-2848. *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 933 (2d Cir. 1983) (“defenses to enforcement of foreign awards under the Convention are narrowly construed”)

¹⁶⁰⁴ 517 F.2d 512, 519 (2d Cir. 1975)

¹⁶⁰⁵ *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, XXVIII YBCA 752 (H.K. Court of First Instance, High Court 2003) (2003) (due process and public policy arguments can overlap);

Tribunal”¹⁶⁰⁶ This is referred to by a few authorities as procedural public policy (to be distinguished from substantive public policy).¹⁶⁰⁷

Parties involved in FTA must therefore be aware of the extent to which due process objections based on fast-track procedures may overlap, since some courts have allowed parties to ‘elevate’ such Article V(1)(b) claims to the level of public policy under Article V(2)(b).¹⁶⁰⁸ Such moves allow the enforcing court to look to its own law to decide on the recognition of fast-track procedures rather than to the law of the arbitral seat.¹⁶⁰⁹

Some people may find the overlap between the procedural protections of Article V(1)(b) and the public policy provisions of Article V(2)(b) unproblematic.¹⁶¹⁰ However, it seems inappropriate to allow a specific objection permitted under Article V(1)(b) to fall also under the more general provisions of Article V(2)(b). Limiting due process objections to Article V(1)(b) would appear to (1) better reflect the parties' presumed expectations regarding the standards that apply to the FTA proceedings; (2) help ensure creation of an enforceable award by avoiding any surprises regarding the public policy concerns applicable to the dispute;¹⁶¹¹ and (3) limit the use of the public policy exception to truly exceptional cases, as appears to have been contemplated by the drafters of the NYC.¹⁶¹² Although objections under Article V(2)(b) may be easily brought,¹⁶¹³ the enforcing court's scope of review is actually extremely limited.

¹⁶⁰⁶ Judgment of 8 February 1978, *Chrome Resources SA v. Léopold Lazarus Ltd*, XI YBCA 538 (Swiss Federal Tribunal) (1986)

¹⁶⁰⁷ See, e.g., Mantilla-Serrano (2004) p. 333; Redfern/Hunter (2004) p. 459 ¶ 10-54

¹⁶⁰⁸ See e.g., *Jiangsu Changlong Chem. Co., Inc. v. Burlington Bio-Med. & Sci. Corp.*, 399 F. Supp. 2d 165, 168 (EDNY 2005); Judgment of 17 July 2003, *Italian Party v. Swiss Company XXIX* YBCA 819 (at p. 829) Obergericht [Court of Appeal], Zurich (2004); Judgment of 17 February 1998, *Unión de Cooperativas Agrícolas Epis-Centre v. La Palentina SA (France v. Spain)* XXVII YBCA. 533 (at pp. 538- 539) Tribunal Supremo [Supreme Court] (2002)

¹⁶⁰⁹ See NYC, Article V(2)(b); Horvath (2001) p. 143.

¹⁶¹⁰ Harris (2007) 17; ILA Final Report para. 29.

¹⁶¹¹ There has been a great deal of discussion about the extent to which an arbitral tribunal can or should consider foreign public policy when issuing an award. Born (2009) pp. 2180-2184; Platte (2003) p.312

¹⁶¹² Born (2009) at p. 2828.

¹⁶¹³ Lew/Mistelis/Kröll (2003) p. 721 ¶ 26-114; Böckstiegel (1987) pp. 177, 179.

Thus, courts have rejected claims of public policy exceptions based on procedures for selecting a sole arbitrator,¹⁶¹⁴ questioning a party's expert witness,¹⁶¹⁵ the failure of the tribunal to render a reasoned award,¹⁶¹⁶ and the submission of fraudulent testimony in arbitral proceedings.¹⁶¹⁷ Other objections based on procedural public policy may be based on 'fraud in the composition of the tribunal; breach of natural justice; lack of impartiality; lack of reasons in the award; manifest disregard of the law; manifest disregard of the facts; and annulment at place of arbitration'.¹⁶¹⁸ As under Article V(1)(b), courts have given substantial weight to the parties' procedural autonomy and the arbitrators' procedural discretion in applying procedural public policies under Article V(2)(b).¹⁶¹⁹

More fundamentally, it is unclear what legitimate purpose the notion of procedural public policy under Article V(2)(b) serves. As discussed above, Article V(1)(b) was drafted specifically to establish a uniform international standard for the procedural conduct of arbitrations,¹⁶²⁰ while Article V(1)(d) permits non-recognition based on violations of the parties' agreed arbitral procedures or (absent agreement) violations of the procedural law of the

¹⁶¹⁴ See, e.g., Judgment of 1 February 2001, XXIX YBCA 708 (German Bundesgerichtshof) (2004) (rejecting claim that party's nomination of sole arbitrator, pursuant to arbitration agreement in arbitration seated in England, violated German public policy). See also Judgment of 18 October 1999, XXIX YBCA 700 (Oberlandesgericht Stuttgart) (2004); Judgment of 26 January 1989, XVII YBCA 491 (Hanseatisches Oberlandesgericht Hamburg) (1992) (rejecting argument that party was denied opportunity to be heard, in violation of German public policy).

¹⁶¹⁵ See, e.g., *Indus. Risk Insurers v. MAN Gutehoffnungshütte GmbH*, 141 F.3d 1434 (11th Cir. 1998) (no public policy violation where arbitral tribunal called award debtor's former expert to give testimony).

¹⁶¹⁶ See, e.g., Judgment of 24 January 1997, *Inter-Arab Inv. Guarantee Corp. v. Banque Arabe et Internationale d'Investissements*, XXII YBCA 643, 652 (Brussels Cour d'appel) (1997); *Food Serv. of Am., Inc. v. Pan Pacific Specialties Ltd*, 32 B.C.L.R.3d 225 (B.C. S.Ct. 1997); *Schreter v. Gasmac Inc.*, 7 O.R.3d 608 (Ontario Court of Justice 1992) (unreasoned award recognized); Judgment of 27 July 1978, IV YBCA 266 (Hanseatisches Oberlandesgericht Hamburg) (1979); Judgment of 22 October 1976, *SA Tradax Export v. Spa Carapelli*, III YBCA 279 (Florence Corte di Appello) (1978)

¹⁶¹⁷ Judgment of 26 January 2005, XXX YBCA 421 (Austrian Oberster Gerichtshof) (2005) (fact that "the foreign arbitral award is therefore based on an intentionally false witness statement does not make recognition and enforcement of the arbitral award at odds with public policy")

¹⁶¹⁸ Lew/Mistelis/Kröll (2003) p.722 ¶ 26-117

¹⁶¹⁹ Judgment of 18 January 1990, YBCA 503 (German Bundesgerichtshof) (1992) (relying on fact that "such type of procedure basically is in accordance with the practice of arbitral tribunals in the commodity trade in London" to reject argument based on procedural public policy); Judgment of 29 June 1989, XVI YBCA 546 (Oberlandesgericht Frankfurt) (1991) (respondent's choice not to be represented was deliberate and cannot be grounds for claiming violation of procedural public policy").

¹⁶²⁰ Born (2009) pp. 2744-2746.

arbitral seat.¹⁶²¹ In these circumstances, the application of procedural public policies under Article V(2)(b) serves only to permit a limited imposition of local public policies on international arbitrations seated abroad which, by hypothesis (given Article V(1)(b)), satisfy international procedural standards. Given the Convention's objectives, it is difficult to see why such a basis for non-recognition would have been intended (or serve any desirable purpose); the better course would be not to expand the scope of Article V(2)(b) and instead to limit it to substantive public policies.¹⁶²²

5.2.3.4.2 Substantive Public Policy

Public policy relating to procedural irregularities is not the only possible ground for non-enforcement of a FTA award under Article V(2)(b). There are a limited number of decisions from developed jurisdictions where substantive public policies have been relied upon to deny recognition to foreign awards.¹⁶²³

These objections typically include violations of the principle of good faith and *pacta sunt servanda*, the abuse of rights, activities that are *contra bonos mores*,¹⁶²⁴ punitive damages and breaches of competition law.¹⁶²⁵ For example, the national laws of certain countries do not allow the arbitrator hearing an arbitration in that country to award interest to a monetary claim. Any award that includes interest may not be enforceable in that country.¹⁶²⁶ One US court concluded that the imposition of 5% more interest than normal

¹⁶²¹ Born (2009) pp. 2764-2777.

¹⁶²² Domenico/Martin (2001)

¹⁶²³ *Victrix SS Co. v. Salen Dry Cargo AB*, 825 F.2d 709, 714 (2d Cir. 1987) (default award against a bankrupt party not enforced because payment of the award from the debtor's estate would conflict with a US public policy of giving effect to a Swedish bankruptcy proceedings for the equitable distribution of the estate's assets); *Transmarine Seaways Corp. of Monrovia v. Marc Rich & Co. AG*, 480 F.Supp. 352, 358 (S.D.N.Y. 1979) ("public policy" exception would apply to awards pursuant to arbitration agreements obtained by duress); *Laminoirs-Trefileries-Cableries de Lens, SA v. Southwire Co.*, 484 F.Supp. 1063 (N.D. Ga. 1980).

¹⁶²⁴ ILA Final Report at para. 28.

¹⁶²⁵ Lew/Mistelis/Kröll (2003) pp. 722 ¶ 26-118.

¹⁶²⁶ *Soleimany v. Soleimany*, 1999 Q.B. 785 (C.A. 1998); *Intercontinental Hotels Corp. (Puerto Rico) v. Golden*, 203 N.E.2d 210 (N.Y. 1964). See also Rau (2007) p. 25

market rates violated applicable US public policy against contractual penalties.¹⁶²⁷

Similarly, punitive damages are frequently considered to violate public policy. An arbitral tribunal sitting in Switzerland rejected a claim for exemplary damages as being contrary to Swiss public policy even though the applicable substantive law may have permitted exemplary damages.¹⁶²⁸ In Germany, punitive damages are also contentious and one view is that an award of punitive damages is unconstitutional.¹⁶²⁹ In a leading judgment handed down by the Federal Supreme Court of Germany (Bundesgerichtshof) in 1992, part of a United States court decision was refused enforcement because it provided for the recovery of punitive damages.¹⁶³⁰ Although these examples relate to substantial matters and thus do not concern the enforcement of an FTA award directly, they demonstrate that the place of enforcement can take an unsympathetic view of a particular FTA provision and deny enforcement. Article V(2)(b) of the New York Convention explicitly states that these objections are viewed from the perspective of the enforcing state, but questions often arise as to whether and to what extent the public policy of other potentially interested states can or should be taken into account during an enforcement proceeding.¹⁶³¹

¹⁶²⁷ *Laminoirs-Trefileries-Cableries de Lens, SA v. Southwire Co.*, 484 F.Supp. 1063 (N.D. Ga. 1980) By contrast in *Arcata Graphics Buffalo Ltd v. Movie (Magazine) Corp.*(Ontario 1993) (awarding rate of interest not permitted by enforcement forum not violation of public policy).

¹⁶²⁸ Final Award in ICC Case No 5946, XVI YBCA 97, 113 (1991).

¹⁶²⁹ Nils/Rademacher (2009) p. 76.

¹⁶³⁰ *Ibid* 76 citing from Bundesgerichtshof (Neue Juristische Wochenschrift, 1992) p. 3096 et seq.

¹⁶³¹ ILA Final Report, paras. 20, 39.

5.2.3.4.3 National court decisions relying on expansive interpretations of public policy

Some states have interpreted public policy very broadly to refuse recognition to foreign FTA awards on two specific grounds: reasoned awards and time limits.¹⁶³²

The arbitration laws of many countries prescribe that the award must contain the reasons on which the arbitration decision is based. In these countries, it is considered fundamental that the parties should be informed as to how justice has been done in their case.¹⁶³³ On the other hand, in several common law countries, it has been customary not to give reasons in the award. Generally, the courts of the countries where the giving of reasons is mandatory enforce awards without reasons made in countries where such awards are valid.¹⁶³⁴

Apart from cases where an arbitration award contains no reasons at all, awards are frequently attacked under Article V(2)(b) for containing “contradictory” reasons. Reasons in an award which contradict one another may result in a court's determining that the award has no reasons at all. To prevent this ground from being used to review the merits of an award - which is not permitted by the NYC - extreme caution is required from the arbitrator that drafts the reasons. Similarly, there may be FTA awards where the summary reasoning is so confused that the award becomes bereft of any logic.¹⁶³⁵

¹⁶³² Kronke/Nacimiento/Otto/Port (2010) p. 367 et seq.

¹⁶³³ *Ibid* 375

¹⁶³⁴ Oberlandesgericht of Hamburg, 27 July 1978 (F.R. Germany No. 18) and S.A. Tradax Export v. S.p.A. Carapelli (Italy No. 18), Corte di Appello of Florence, 22 October 1976, both concerning awards made in England.

¹⁶³⁵ Cour d'Appel de Paris (1997), Inter-Arab Investment Guarantee Corp. v. Banque Arabe et Internationale d'Investissements SA, 1998 Rev Arb 143; Caja Nacional de Ahorro y Seguros v. Deutsche Rückversicherung AG, 2007 U.S. Dist. LEXIS 56197 (decided 2007)(US District Court for the Southern District of New York, US), where the court found that the award did include reasons so that the applicable arbitration rules (which required a reasoned award unless the parties agree otherwise) were not violated.

Failure to provide reasons is not universally regarded as a violation of public policy.¹⁶³⁶ The domestic arbitration laws of some countries do not necessarily give reasons for an award unless a party requests it;¹⁶³⁷ therefore, these countries tend to regard the absence of reasons as not being contrary to public policy. However, since not all courts enforce foreign awards if their own domestic public policy would not allow an unreasoned award, it is prudent to check the applicable arbitration laws before drafting FTA clauses.¹⁶³⁸

The other contested area is time limits. Parties to an FTA agreement often agree on fixed time limits within which the arbitrators must render an award, removing the arbitrators' discretion in the matter as such time limits may not be extended by the arbitrators themselves. A violation of party-agreed time limits has been held to be a ground for refusal under the public policy clause,¹⁶³⁹ as the arbitrators lose their mandate upon expiration of the time period.¹⁶⁴⁰

Some countries impose onerous sanctions for failure to respect these time limits. In Belgium, failure to observe time limits results in the award being null and unenforceable.¹⁶⁴¹ In Italy, it is a ground for setting aside the award.¹⁶⁴² However, Art.821 (1) of the Italian CCP provides that the expiry of the time-limit may not be relied upon as a ground for nullity of the award if the party has failed to notify the other parties and the arbitrators, before the deliberation, of its intention to rely on the termination of the arbitrators

¹⁶³⁶ *Areios Pagos* (decided 2007), XXXIII YBCA 565 (Supreme Court, Greece) (2008). But see Komarov (2001) 411, who believes that lack of reasons would render a foreign award unenforceable in Russia.

¹⁶³⁷ See India's Arbitration and Conciliation Act of 1996.

¹⁶³⁸ Vasani/Tallent (2006) p. 255; Shaleva (2003) pp. 83

¹⁶³⁹ *Dubois & Vanderwalle v. Boots Frites BV*, (decided 1995 & 1999) 1996 Rev. Arb 100 (Paris Court of Appeals, France).

¹⁶⁴⁰ Cairo Court of Appeal, unreported judgment of Feb. 29, 2008, case no. 16/124, summary in ITA Monthly Report, Apr. 2008 (Cairo Court of Appeal, Egypt).

¹⁶⁴¹ Belgian Arbitration Act of 1998, Article 1698

¹⁶⁴² Italian CCP of 2006, Article 829 (6)

authority owing to the expiry of time limits.¹⁶⁴³ In Brazil, an arbitral award is clearly null and void if it is made after the time limit.¹⁶⁴⁴

In one case, a Turkish appeals court refused enforcement of a foreign award on the ground that the Swiss-based arbitration tribunal failed to conduct the arbitration within the time limits imposed by Turkish procedural laws. The arbitration agreement contained a clause that the arbitration tribunal “*shall take as base the provisions of this contract and Turkish laws in force.*” The court held that this clause amounted to a choice of Turkish procedural law.¹⁶⁴⁵ Article 10(a) of Turkey's International Arbitration Law no. 4686 provides that the arbitration tribunal must render its award within one year after commencing proceedings.¹⁶⁴⁶ Thus, the court held that the tribunal's failure to meet this time limit and, consequently, to apply Turkish procedural law rendered the award unenforceable. The court based its decision on Article V(1)(d) and did not consider whether there had been a violation of public policy.¹⁶⁴⁷

The court's interpretation of the clause, however, was questionable. The prevailing view is that the procedural law governing the arbitration is the law at the place of arbitration (or *lex arbitri*); the choice of substantive law has no impact on the applicable *lex arbitri*. Furthermore, Article V(1)(d) is not triggered by a tribunal applying the “wrong” procedural law unless the error deprives a party of rights or unless the actual procedure is materially different.¹⁶⁴⁸

¹⁶⁴³ Italian CCP of 2006, Article 821(1)

¹⁶⁴⁴ Brazil Arbitration Act of 1996, Article 32 (VII)

¹⁶⁴⁵ *Osuuskunta METEX Andelslag V.S. v. Türkiye Elektrik Kurumu Genel Müdürlüğü* General Directorate, Ankara (decided 1996), XXII YBCA 807 (at 810-811) (Court of Appeals, Turkey).(1997)

¹⁶⁴⁶ Tekinalp/Günaçin (2001) p 730.

¹⁶⁴⁷ *Ibid* XXII YBCA 807 (at 813) (Court of Appeals, Turkey).(1997)

¹⁶⁴⁸ See also the dissenting opinion of Çiftçi, J., *ibid.*, at 813, who stressed that the alleged irregularities were insufficient to warrant a denial of enforcement.

French domestic arbitration practice provides various examples for the setting aside of an award due to a lapse of the time-limit.¹⁶⁴⁹ In *Dubois & Vanderwalle v. Boots Frites BV*¹⁶⁵⁰, the Court of Appeals (Cour d'Appel) of Paris had to rule whether a foreign award could be recognised and enforced which had been rendered not within the three-months time limit stipulated in the arbitration clause, but about one month later.¹⁶⁵¹ It held:

*“The principle that the time limit set by the parties ... for the arbitrators to accomplish their task may not be extended by the arbitrators, reflects a need which pertains to public policy, both domestic and international, in that it is inherent to the contractual character of arbitration...”*¹⁶⁵²

The Court found that Article 1502(5) of the New Code of Civil Procedure (NCCP)¹⁶⁵³ provided the ground for refusal, since, *“in taking a power which they did not have, the arbitrators violated international public policy.”*¹⁶⁵⁴ In this case the court considered that the arbitrator had decided on the basis of an agreement which had expired¹⁶⁵⁵ and an award rendered without the arbitrators’ mandate violated international public policy.¹⁶⁵⁶

A similar approach is adopted by Articles 34(1)(2) and 36 of the Swedish Arbitration Act (1999)¹⁶⁵⁷ and the Inter-cantonal Concordat which governs domestic arbitration in Switzerland.¹⁶⁵⁸ However, the situation in Switzerland is quite different. There is no Swiss decision vacating an award on this ground

¹⁶⁴⁹ Sonidep v. Sigmoil (1994, June 15). Cass. 1e civ. France. 1995 Rev. Arb. 88, 1st Decision, and E. Gaillard's Note; Communauté urbaine de Casablanca v. Degrémont. (1994, June 15). Cass. 1e civ. France. 1995 Rev. Arb. 88-101, 2d Decision, and E. Gaillard's Note.

¹⁶⁵⁰ Judgement of 22 September 1995, *Dubois & Vanderwalle v. Boots Frites BV*. XXIVa YBCA 640, (CA. Paris. France) (1999)

¹⁶⁵¹ *Ibid* 641

¹⁶⁵² *Ibid* 642

¹⁶⁵³ French NCPC Article 1502 is revised as French NCPC (2011) Article 1520 and 1525 in 2011 without significant changes.

¹⁶⁵⁴ See supra p. 311 fn. 1639, *Dubois & Vanderwalle v. Boots Frites*, p. 642.

¹⁶⁵⁵ French NCPC of 1981, Article 1502(1). Notably this was not included in French NCPC of 2011, Article 1520 and 1492

¹⁶⁵⁶ French NCPC of 1981, Article 1520.

¹⁶⁵⁷ Swedish Arbitration Act of 1999 Articles 34 and 36

¹⁶⁵⁸ Inter-cantonal Concordat 1969 Article 4 but New Swiss CCP (2011) superseded the Concordat in which there are limited grounds for annulment. See New Swiss CCP of 2011, Article 393

under the Swiss Private International Law Act (PILA). In fact, a contrary decision was rendered in 1984 by the Court of Appeal of Basel City. It stated that the arbitrators' mission did not end merely because the deadline for the rendering of the award under the ICC Rules had expired before the award was issued.¹⁶⁵⁹ According to this decision, rather than rely on the state court, the remedy in such cases resides in the power of the ICC Court to invalidate the mandate of arbitrators who do not discharge their duties properly and within prescribed time limits.¹⁶⁶⁰ Although rendered under the International Treaty on Arbitration (CIA) rather than PILA and an earlier version of the ICC Rules, it is submitted by Poudret that the underlying principle of this decision remains valid today in Switzerland.¹⁶⁶¹

Whether FTA provisions should be considered as procedural or substantive public policy¹⁶⁶² depends on whether FTA can be realistically obtained without some of its provisions. If the need to proceed within a specific time limit is considered substantive in nature, then the decision to allow time extension would seem to constitute an evaluation of the parties' rights.¹⁶⁶³ Therefore, arbitrators cannot use their discretion to extend time limits. Alternatively, if the need to proceed within a specific time limit is considered *merely* procedural, then the arbitrators' decision to extend time limits would appear to be part of the dispute resolution process.¹⁶⁶⁴ However, even if the decision is considered ripe for an enforcing court's review, that does not necessarily mean that FTA can or should be determined to be counter to public policy, for two reasons.

¹⁶⁵⁹ Decision of the Court of Appeal of Basel-City of 2 January 1984, K. KG v. M. SA and M. G.. ASA Bulletin 1985, pp. 19 et seq., at pp. 24-25.

¹⁶⁶⁰ In that connection, it should be noted that SCAI Rules of 2012 Article 12 also enables the Chambers to revoke arbitrators who fail to perform their functions despite a written warning.

¹⁶⁶¹ Poudret/Basson/Berti/Ponti (2007) p. 380 para 454

¹⁶⁶² Mantilla-Serrano, F. (2004) p. 333

¹⁶⁶³ Böckstiegel (1999) p. 52

¹⁶⁶⁴ Kerr (1997) p. 139

First, the increased availability of techniques to reduce time and cost in international arbitration laws and institutional rules suggests that FTA proceedings cannot be said to be contrary to public policy, even if some individual countries still view non-extendable time limits and unreasoned awards with suspicion.¹⁶⁶⁵ Since the only public policy that can be considered at the recognition stage is international in scope, courts cannot hear objections to FTA proceedings based on domestic public policy concerns. Indeed, several commentators have concluded that the fact that a fast-track procedure is not available in the enforcing state's domestic legal system does not mean that allowing such a procedure in arbitration would violate that such countries' public policy.¹⁶⁶⁶

Secondly, permitting a broad, general public policy argument to prevail over the detailed procedural provisions of Article V(1) seems to fly in the face of the purpose of the NYC, which was intended to increase, rather than decrease, the ease with which awards are enforced.¹⁶⁶⁷ Furthermore, commentators have typically read the procedural objections outlined in Article V(1) as conclusively defining the corpus of international procedural public policy, or (even more generally) have defined international procedural public policy as simply constituting equal treatment, fair notice and the right to present one's case.¹⁶⁶⁸ Those criteria will likely be met by any of the potential forms of FTA rules and procedures discussed in this thesis, though of course individual fast-track procedures must be considered as they arise.¹⁶⁶⁹

Interestingly, Gary Born has noted that it is difficult to see what public policy objections could be raised against FTA.¹⁶⁷⁰ The fact that some FTA provisions are not available in many national arbitration systems should not preclude the use of FTA. There may be requirements regarding procedural regularity and

¹⁶⁶⁵ Augenblick/Mean/ Robine (1994) p. 135

¹⁶⁶⁶ Kronke/Nacimiento/Otto/Port (2010) p. 297

¹⁶⁶⁷ Born, G. (2009) p. 2855

¹⁶⁶⁸ Schwebel/Lahne (1987) pp. 205 and 216

¹⁶⁶⁹ Mayer/ Sheppard (2004) p.339

¹⁶⁷⁰ Harris (2007) p. 18

an opportunity to be heard, imposed by national law, but these would involve the implementation of the FTA, not its basic enforceability.¹⁶⁷¹

All of this suggests that enforcing courts should be particularly cautious about upholding an objection based on public policy in cases where the parties have chosen to have the dispute governed by the law of another state.¹⁶⁷² Indeed, rather than considering what the procedural law of the FTA is in the abstract, the tribunal (and national courts) would be better to consider what the parties' agreement requires in each particular case.¹⁶⁷³

It may be difficult, as a political matter, for some courts to enforce an award arising out of a FTA when the enforcing state views its policy against FTA procedures as a non-violable fundamental right similar to a mandatory provision of law.¹⁶⁷⁴

Courts that are faced with conflicts between parties' FTA agreements and public policy concerns must decide whether the enforcing state's own views on the policies underlying fast-track procedures have any role to play in the enforcement proceedings. In so doing, courts must consider (1) whether the interest affected is sufficiently fundamental to the enforcing state's legal system to justify non-enforcement;¹⁶⁷⁵ (2) the international nature of the dispute and the connection of the dispute to the legal system of the forum;¹⁶⁷⁶ (3) the possible existence (or absence) of an international consensus regarding the principle in issue;¹⁶⁷⁷ and (4) the extent of the connections between the parties and the subject matter of the dispute to the enforcing state.¹⁶⁷⁸ Only if the enforcement of the FTA award would 'manifestly disrupt the essential political, social or economic interests' of the enforcing state

¹⁶⁷¹ Born (2009) p. 1232, fn. 442

¹⁶⁷² *Ibid.* pp. 1343-1347

¹⁶⁷³ *Ibid.* pp. 1344-1345.

¹⁶⁷⁴ Kurkela/Snellman (2005) p. 11; Böckstiegel (1987) p. 183.

¹⁶⁷⁵ Kawharu (2007) p. 491

¹⁶⁷⁶ Caprasse (2008) p. 735

¹⁶⁷⁷ Gibson (2009) p. 1247

¹⁶⁷⁸ ILA Final Report para. 40.

should the enforcing court consider giving effect to the enforcing court's national policy.¹⁶⁷⁹

5.3 Developing wider scope for FTA – procedural issues

The support of the NYC, national law and national courts for FTA constitutes an important infrastructure, however, at the end of the day, it is the parties' satisfaction with the FTA process which is essential for improving the scope for FTA. This section considers how FTA can be improved to make it more attractive to parties.

5.3.1 Drafting Clear Clauses

Drafting a clear and unequivocal arbitration clause avoids wasting time and money arguing over its interpretation later.¹⁶⁸⁰ Drafting such a clause requires knowledge of fast-track procedures, their suitability for such disputes as may arise and, if the clause refers to an arbitral institution, how the FTA rules of a particular institution work in practice.¹⁶⁸¹

For many parties, it is difficult to predict the nature of a future dispute before it arises.¹⁶⁸² For them, predetermined time limits like those in the AAA, WIPO, CPR and SCC Expedited Rules, or even the overall limit on the length of arbitration as set forth in the HKIAC Rules, may hinder the resolution of a dispute if it too complex to be resolved quickly.¹⁶⁸³ In such cases, it may be better if the arbitral tribunal is established rapidly, but the parties are then given unlimited time to present and argue the underlying merits.¹⁶⁸⁴ The swift appointment of the arbitral tribunal goes a long way to speeding the case and reaching an award. Limiting the tribunal to a sole arbitrator can have an

¹⁶⁷⁹ *Ibid* para 40. See also Lew/Mistelis/Kröll (2003) pp. 731-732

¹⁶⁸⁰ Coe (2002) p.61

¹⁶⁸¹ Mustill (1998) p.17

¹⁶⁸² Trakman (2008) p.295

¹⁶⁸³ Blacker (2000) p.55

¹⁶⁸⁴ Eisemann (1974) p. 69-112

unpredictable but real impact on the outcome in a complex case so provision for later appointing a three-members arbitral tribunal should be guaranteed under FTA proceedings.¹⁶⁸⁵

On the other hand, for parties who anticipate only one kind of dispute arising under their arbitration clause, and who are familiar with the course of FTA, imposing shortened time limits and procedural constraints in the arbitration clause may be the most sensible option.¹⁶⁸⁶ These parties should closely analyse the differences between institutional FTA Rules to determine which model suits their needs.¹⁶⁸⁷

To ensure the workability of any time limits and procedural constraints, it is important to draft these in non-mandatory terms, leaving an option for their extension on a case-by-case basis. However, parties rarely possess the required understanding.¹⁶⁸⁸ They frequently try to invent their own FTA procedures in order to increase speed and economy but in doing so run the risk of binding themselves and the arbitrators to impossible time limits or creating FTA provisions which will be difficult to deal with in practice in a subsequent dispute.¹⁶⁸⁹

Although it seems obvious that parties should conduct the requisite due diligence before drafting an FTA clause, the arbitration literature is teeming with examples of omitted terms or ill-defined arbitration clauses resulting in the failure of FTA procedures and unenforceable awards.¹⁶⁹⁰

The case of *Walkinshaw v. Diniz*¹⁶⁹¹ is a good illustration of the complications that may arise out of an unclear FTA clause. In this case, Arrows, owners and

¹⁶⁸⁵ Sachs (2010) p. 1055

¹⁶⁸⁶ Redfern (2008) p.38

¹⁶⁸⁷ Gelinis (1998) p. 46-66

¹⁶⁸⁸ Medalie (1990) pp.18-20.

¹⁶⁸⁹ Wagoner (1993) p. 82

¹⁶⁹⁰ Craig/Park/Paulsson (1990) p. 158 § 9.01

¹⁶⁹¹ *Walkinshaw v Diniz* (Stay of Proceedings), (1999, May 19), Queen's bench division (commercial court) [1999] WL 33105608; [2000] 2 All ER (Comm) 237

operators of the Arrows Formula One racing team, entered into a contract with Diniz, a professional Formula One racing driver on 24 October 1997, under which Diniz would drive for them during the 1998 and 1999 Formula One World Motor Racing Car Championships (F1).¹⁶⁹² The agreement was in accordance with the 1997 F1 Concorde Agreement which set out the respective obligations of the parties and required the contract between the driver and his team to contain a provision for the resolution of conflicts by way of fast-track arbitration under the Contract Recognition Board (CRB) of the Federation Internationale de l'Automobile.¹⁶⁹³ This provision was incorporated into the contract between Diniz and Arrows by the CRB's 'off the peg' FTA clause in clause 11(1) which provided an expedited dispute resolution process for the resolutions of disputes between the racing driver and racing team.¹⁶⁹⁴ However, the parties added their own dispute resolution procedures in clause 11(2) under which they agreed that the contract, otherwise provided in clause 11(1), should be governed by English Law and subject to the exclusive jurisdiction of the courts of England.¹⁶⁹⁵

In December 1998, the parties were faced with a dispute that needed to be resolved within a very short time period, as the championship was about to begin.¹⁶⁹⁶ The F1 driver Diniz submitted the dispute to the CRB on 15 December 1998, which quickly convened an ad hoc arbitral tribunal sitting in Geneva that had jurisdiction over certain contract issues between F1 drivers and teams. However, before the CRB made a decision, the racing team Arrows, not wanting to submit to arbitration, filed a legal action on 16 December 1998 against the driver in the English High Court.¹⁶⁹⁷ For them the issues in dispute were not within the scope of arbitration clause 11.1 and had entered their claim by way of the general conditions governing all issues

¹⁶⁹² *Ibid* p.237

¹⁶⁹³ Schultz (2006) p.8

¹⁶⁹⁴ Kaufmann-Kohler/Peter (2001) p. 183

¹⁶⁹⁵ [2000] 2 All ER (Comm) 237

¹⁶⁹⁶ *Ibid*

¹⁶⁹⁷ Born (2011) pp. 92

between Formula One drivers and teams under the jurisdiction of English Courts.¹⁶⁹⁸

In response to legal action, Diniz sought a stay of the English court pursuant to the Arbitration Act 1996 section 9,¹⁶⁹⁹ contending that, pursuant to clause 11.1 of the agreement, the dispute was one which the parties had agreed should be determined by fast-track arbitration under the administration of the CRB.¹⁷⁰⁰

The CRB went on to render a very quick decision within 1 month of the establishment of the arbitral tribunal on 17 February 1999, in compliance with its fast-track rules, which provided that it must issue a decision within three days after the hearing with the parties.¹⁷⁰¹

However, on 19 May 1999 the High Court judge Thomas J. dismissed Diniz's application and held that whilst the proceedings before the CRB were FTA in character, by virtue of clause 7.9 of the contract, the CRB's tribunal was limited to a decision upon which contract took preference and whether the contract between Arrow and Diniz had been terminated.¹⁷⁰² Thus, the court rejected the jurisdiction of the ad hoc arbitral tribunal to resolve the dispute and consequently issued an injunction against the continuance of the CRB's FTA tribunal. Notably, Thomas J delivered no separate reasons for his anti-arbitration injunction consequent upon his refusal to stay the English litigation. The issues were finally resolved in accordance with two further judgments in the English Commercial Court dated on 4 May 2000 and 2 February 2001, following an eight-day trial.¹⁷⁰³ Thus, the court decision on this matter finally

¹⁶⁹⁸ [2000] 2 All ER (Comm) 237

¹⁶⁹⁹ English Arbitration Act of 1996 Article 9 follows Article II of the NYC and, likewise, is concerned only with the validity, operativeness and workability of the arbitration agreement, not the underlying contract as a whole.

¹⁷⁰⁰ [1999] WL 33105608

¹⁷⁰¹ Davis/Smit/Brown/Affaki/et al. (1994) p.421

¹⁷⁰² Kaufmann-Kohler/Peter (2001) p.186

¹⁷⁰³ Walkinshaw v Diniz (2001, February 02), Tomlinson J., (2001), 1 Lloyd's Rep. 632; Walkinshaw v Diniz (Court of Appeal) (2002, February 01), Waller J., (2002), 2 Lloyd's Rep. 165

came almost 2 years later than the fast-track arbitral award made by the CRB's tribunal on 17 February 1999.

Another example shows how an ambiguous clause allowed a conflict to arise between the two competing procedures of fast track and regular track. In 1984 the Court of Appeal of Paris took a decision relating to an ad hoc arbitration¹⁷⁰⁴ where the arbitration clause contained two segments. For all disputes relating to the goods, arbitration was to take place within ten days from the designation of the arbitrators; for all other disputes, a general arbitration clause with no time limit was provided.¹⁷⁰⁵

A dispute arose between the parties on the quantity of the goods alleged to be not in compliance with the contractual requirements negotiated by the parties. The arbitrator rendered his decision more than ten days after having been appointed. In the absence of any extension, the Court of Appeal of Paris ruled that, as the dispute related to the goods and as the arbitrator rendered his award on the basis of an expired arbitration clause, the award had to be annulled.¹⁷⁰⁶ If the time limit inserted in the segmented arbitration clause had been more realistic, the arbitrator might have been able to give an award within the time limit, thus avoiding the annulment of the award on that basis.

In another arbitration in France¹⁷⁰⁷ the arbitration clause provided that the award was to be rendered within two months from the closing of the written arguments. The Court of Appeal of Paris annulled the award, as the date of the closing of the arguments had been changed by the arbitrators who did not seek the parties' agreement to extend the time limit for the award.¹⁷⁰⁸ The difficulty in this case was that of the definition of the starting point of the time limit. The clause did not define closing of the written submissions.¹⁷⁰⁹ The

¹⁷⁰⁴ Judgement of 14 January 1984, (C.A. Paris 1re Ch. Civ.) 1984 Rev. Arb. 498 and Fouchard's Note

¹⁷⁰⁵ Scalbert/Marville (1988) p.117

¹⁷⁰⁶ Supra fn. 1704 Fouchard's Note p.500

¹⁷⁰⁷ Judgement of 13 January 1993, (Cass. Civ. 2ieme), 1993 J.C.P. II 22179

¹⁷⁰⁸ Boissésou (1990) p.769

¹⁷⁰⁹ Cass. Civ. 2ieme, (1993, January 13), 1993 J.C.P. II 22179

court held that this was to be understood as being the last filing of the parties' submissions.¹⁷¹⁰

These problems are mainly caused by the imposition of midnight FTA clauses which are introduced into commercial agreements after all other points are clear and no one wants to delay the contract by elaborating on detailed rules to govern a possible dispute.¹⁷¹¹ The respective lawyers merely ask their litigation and arbitration colleagues for a good arbitration clause, with the result that the clause does not take into account the specifics of the case.¹⁷¹² Such careless clauses may allow the parties to submit their dispute to FTA but they are generally silent on how fast-track procedure should be conducted, which puts the burden on the arbitrators to decide what FTA procedures are most appropriate.¹⁷¹³

Unclear FTA clauses give opportunities for reluctant parties to adopt time-consuming litigation on whether the fast-track dispute qualifies for expedited treatment or whether the arbitration clause is pathological.¹⁷¹⁴ Given that any ambiguity of an FTA agreement has the potential to delay the fast-track process, the FTA clause should be clear on what will happen if the conditions for FTA proceedings are not met.¹⁷¹⁵ To achieve this, in their FTA agreement parties should authorize the tribunal to resolve any interpretation questions that may arise and to remand the remaining issues or disputes for FTA or regular arbitration as appropriate.¹⁷¹⁶

A safer solution is for parties to adopt a model institutional FTA Clause which reflects the arbitral community's best thinking on fast-track procedures.¹⁷¹⁷ In practice, less is often more, and simpler, more general FTA clauses can avoid

¹⁷¹⁰ Judgement of 13 January 1993, (Cass. Civ. 2ieme), 1993 J.C.P. II 22179

¹⁷¹¹ Broichmann (2010)

¹⁷¹² Welser/Klausegger (2009) p. 275

¹⁷¹³ Sentner (2008) p. 77

¹⁷¹⁴ Davis/Lagace/Volkovitsch (1993) p.85

¹⁷¹⁵ Bond (1990) p. 14

¹⁷¹⁶ Downie (1991) pp. 481-82

¹⁷¹⁷ Rau/Sherman (1995)

ancillary disputes over which of the rules have been followed and which not.¹⁷¹⁸ Of course, using institutional model FTA clauses also avoids the equally injurious fault of including too little specificity, especially as to the key components: the applicable law, the number and selection of arbitrators, the language and the seat.¹⁷¹⁹

In order to increase the use of institutional FTA clauses the specific sets of FTA Rules offered should not only save time and cost but should also permit the tribunal and the parties to schedule a regular arbitration once the tribunal has been formed if it becomes necessary.¹⁷²⁰ This approach permits parties to consider fast-track as the primary option but, if the case requires it, to conduct an extensive factual inquiry, including discovery, without the pressure of a fast approaching hearing.¹⁷²¹

5.3.2 Increasing the number of competent and available FTA participants

Another issue that stands in the way of FTA being used more widely is the difficulty of finding competent, experienced and acceptable counsel, arbitrators and institutions.

5.3.2.1 Lack of available, competent counsel

Counsel, by reason of their legal knowledge and their skill in presenting their clients' cases, can play a valuable role in FTA proceedings.¹⁷²² They can ensure that the issues in dispute are properly defined and that the evidence and legal arguments are efficiently and clearly presented to the arbitrator.¹⁷²³

¹⁷¹⁸ Hochbaum (1996) p. 20

¹⁷¹⁹ Kreindler (2001) p. 111

¹⁷²⁰ Sussman/Underwood (2011) p. 22

¹⁷²¹ Zykin (2010)

¹⁷²² Wisner/Rowley/Neil (2011) p.237

¹⁷²³ Aksent (2007) p. 257 (giving an example from 6 weeks ICA where lawyers prepared everything expeditiously in 5 weeks time and gave the author, as a sole arbitrator, one week to render its award)

But often these benefits are not reaped in practice because counsel is insufficiently familiar with the FTA process.¹⁷²⁴

To increase the scope for FTA in-house counsel should be involved more in defining the issues to be contested, the search for expedited solutions, and the creation of FTA rules and procedures.¹⁷²⁵ Arbitral Institutions should solicit counsel's views on issues such as the amendment of arbitration rules, which have a direct impact on counsel's activities in relation to international dispute resolution.¹⁷²⁶ Counsel, and the parties they work for, is the real users of international arbitration, without which ICA would not exist. Ironically, such cooperation does exist for regular arbitration but not for FTA.¹⁷²⁷

Even though short time limits require parties' submissions to demonstrate a high level of advocacy and focus, paradoxically, for inexperienced counsel this can be a time-consuming rather than a time-saving endeavour.¹⁷²⁸ As one arbitration counsel put it: *"I know I could have made my submission shorter, but I just did not have enough time for that."*¹⁷²⁹ Inexperienced counsel are not the only ones to blame. Experienced counsel can also be too ready to put matters off to another day if the opponent proposes it. A change in the attitude of counsel towards how long arbitration should take is likely to go a long way. Counsel may be used to spending two to three-years on a case with resources spread thinly across a number of cases.¹⁷³⁰ However, experience shows that, if circumstances require it, arbitration cases can be prepared for the final hearing within a matter of weeks. Counsel can often do more than they currently do to seize the initiative in bringing arbitration to a swift conclusion.¹⁷³¹

¹⁷²⁴ McIlwrath, M. (2008) p.424

¹⁷²⁵ The AAA's Corporate Counsel Committee is an example of a 'best practice' in this area. Another example is the User's Councils of the LCIA, in North America, Europe, Africa, and Asia, putting together private practitioners, arbitrators, judges, and in-house counsel.

¹⁷²⁶ Bowman (2009) p. 285

¹⁷²⁷ Woods (2011)

¹⁷²⁸ Burr/Karrer (2010)

¹⁷²⁹ Trakman (2007) p. 19

¹⁷³⁰ Sussman/Underwood (2011) p. 22

¹⁷³¹ Yves/Orlandi/Lew (2010)

If FTA is to enjoy wider application counsel need to abandon the habit of relying on the techniques of regular arbitration.¹⁷³²

First of all, counsel should endeavour to play an active role in the selection of the right arbitral tribunal for FTA.¹⁷³³ While institutional FTA rules generally make satisfactory and expedited appointments, counsel for the parties know their case better than any institution ever can. When experienced FTA counsel are involved in the expeditious selection of a sole arbitrator or the chairman, the chances are increased that the arbitral tribunal will have the requisite competence and experience to avoid unnecessary cost and delay and conduct the case in a fast-track manner.¹⁷³⁴

Secondly, cooperation between counsel is enormously useful in ensuring that an FTA moves forward expeditiously.¹⁷³⁵ It is relatively rare for counsel to endeavour to drive a case along at a pace which prevents the opposing counsel from having adequate time to prepare the case. This reciprocal respect for a colleague's legitimate needs is one of the delights of FTA in international commercial dispute resolution. What counsel can agree upon in terms of a procedural timetable, an arbitral tribunal will rarely refuse to follow, apart from the matters of observing overall time limits, fixing hearing dates and guiding procedural constraints.¹⁷³⁶

Thirdly, counsel's conduct should be compatible with the objectives of fast-track procedures.¹⁷³⁷ They should not demand speed while burdening the arbitral tribunal with massive submissions, lengthy hearing requests and dilatory tactics. Arbitrators will best move an FTA along in a timely fashion if they see that counsel from each side put an effort to conduct fast-track

¹⁷³² Park (2011) pp. 287-315

¹⁷³³ Alford (2010)

¹⁷³⁴ Bennett (2009) p.20

¹⁷³⁵ Davison/Nowak (2009) p. 163

¹⁷³⁶ Bleemer (2006) p. 184

¹⁷³⁷ Davis (2004)

procedures in a timely manner.¹⁷³⁸ Too often though, counsel are in the mind-set of wanting to see every conceivably relevant document, and therefore make wide-ranging rather than focused disclosure requests.¹⁷³⁹ While there may be cases where it is appropriate to leave no stone unturned, extensive document disclosure is an obstacle for the effective conduct of FTA procedure.¹⁷⁴⁰

Finally, counsel should not hesitate to advise an arbitration institution if they believe that an arbitral tribunal is going too rapidly, or too slowly.¹⁷⁴¹ They should be able to have reasonable confidence that the institution will take action when and if appropriate to ensure the effectiveness of fast-track procedures.¹⁷⁴²

This thesis suggest that arbitral institutions should not only ensure that arbitral tribunals proceed at a pace appropriate to a particular case, but also accept responsibility for ensuring the success of FTA. Arbitral institutions should have more power to limit the appointment of a person who has never acted as counsel or arbitrator in an FTA; at the same time they should establish programmes to increase counsel's and arbitrator's experience of FTA in international commercial dispute resolution.¹⁷⁴³ Sometimes a party may select counsel who is too busy to devote sufficient time to the FTA case. To avoid this, the arbitral institution may ask counsel to complete availability forms, as arbitrators do.¹⁷⁴⁴

¹⁷³⁸ Oetiker (2008) p.17

¹⁷³⁹ Davis (2004)

¹⁷⁴⁰ Oetiker (2008) p.17

¹⁷⁴¹ Bond (1998) p. 118

¹⁷⁴² *Ibid*

¹⁷⁴³ The AAA's Corporate Counsel Committee is an example of a 'best practice' in this area. Another example is the User's Councils of the LCIA, in North America, Europe, Africa, and Asia, putting together private practitioners, arbitrators, judges, and in-house counsel.

¹⁷⁴⁴ Hauser-Morel, M. (2010) p.24

5.3.2.2 Lack of available, competent Arbitrators

Again and again one hears that the case under consideration is too important to be decided by a newcomer to the arbitration profession.¹⁷⁴⁵ Thus while everyone agrees that new talent must be developed, everyone wants to leave the pioneering to somebody else.

But parties concerns for finding the right person are legitimate as the background and experience of the chosen arbitrator will have a significant contribution to the successful conduct of the FTA process.¹⁷⁴⁶ The awards of newcomers can be mediocre or even downright dreadful under fast-track procedures.¹⁷⁴⁷

Unfortunately, while demand for the services of experienced FTA arbitrators is increasing, driven by new international commerce such as financial transactions, the electricity industry and M&A, the supply remains virtually static.¹⁷⁴⁸ Arbitral institutions, which seek to administer fast-track procedures, have a concomitant responsibility to help ensure an increase in the pool of qualified FTA arbitrators.¹⁷⁴⁹

Increasing the pool of FTA arbitrators could be achieved by a voluntary move by experienced regular arbitrators taking on more FTA.¹⁷⁵⁰ However, only a small percentage of regular arbitrators make such a move because, owing to the much larger volume of cases, the opportunities for employment are much greater in regular arbitration.¹⁷⁵¹

Many of today's best international arbitrators are continuously employed in hearing regular arbitral procedures as part of three-members tribunals. While

¹⁷⁴⁵ Oetiker (2008) p.17

¹⁷⁴⁶ Lord Hacking (2000) pp. 32-37

¹⁷⁴⁷ Rogers (2004) p. 972

¹⁷⁴⁸ Dezelay/Garth (1996) p. 47

¹⁷⁴⁹ Rovine (1992) p. 45

¹⁷⁵⁰ Sachs (2010)

¹⁷⁵¹ Smit/Pechota/Carbonneau/Misteslis (2013)

the appointment of these highly qualified arbitrators as chairmen is undoubtedly highly beneficial, their duties as a party appointed arbitrator could be equally well handled by less experienced arbitrators working as hearing officers under the chairman's supervision. In this way the expert arbitrator could be released from his more mundane duties, allowing him to get involved with FTA.¹⁷⁵²

Unfortunately, the attractive remuneration that regular arbitration generates is an incentive for the arbitrator to accept more arbitration than he has time for.¹⁷⁵³ Thus, given the choice between regular arbitration and FTA, he will almost certainly go for regular arbitration, as it is both more profitable and more flexible, allowing him to accept other appointments.¹⁷⁵⁴

Another lucrative activity for the expert arbitrator is writing lengthy reasoning on routine cases which do not require it. A possible solution to making FTA more financially attractive would be to link arbitrators' fees with the delivery time of the award. The shorter the time for the award, the higher the arbitrator's salary.¹⁷⁵⁵ However, this can only be solution for exceptional cases where speed is of the essence.¹⁷⁵⁶ Many FTA users will not accept the increase in cost in order to achieve speed.¹⁷⁵⁷

Many internationally known arbitrators are unavailable for FTA disputes, either because they are loaded up with existing arbitration cases or because they are employed full-time as permanent arbitration counsel in global law firms.¹⁷⁵⁸ If counsel and the parties truly desire FTA, they should not select arbitrators who are over-burdened.¹⁷⁵⁹ But there are many examples in ICA where an arbitral tribunal composed of three highly experienced arbitrators is

¹⁷⁵² Secomb/Krause/Nacimiento/Ray/Turrini/Goldberg (2011)

¹⁷⁵³ Born (2009) p. 1605-1615

¹⁷⁵⁴ Carter (1995) p. 23

¹⁷⁵⁵ Cutolo/Esposito (2007) p.60

¹⁷⁵⁶ *Ibid*

¹⁷⁵⁷ Park (2010) pp.25-53

¹⁷⁵⁸ Rogers (2004) p. 957

¹⁷⁵⁹ McArthur (2011) p. 57

unable to fix the dates for a hearing until some six to nine months after the date on which the procedural calendar is established.¹⁷⁶⁰ If, for some reason, that hearing has to rescheduled, a similar waiting period can easily be required.

The dearth of experienced FTA arbitrators would be made easier if training was available for individuals to make arbitration their full-time profession.¹⁷⁶¹ Arbitrator-nominating bodies could help by introducing more educational schemes to ensure that their panel of arbitrators receives training on fast-track as well as regular arbitrations.¹⁷⁶² Institutions should also ensure that these newly trained arbitrators are used whenever possible, rather than appointing a small group of experienced arbitrators to a disproportionately large number of cases. In this way a growing number of full-time professional arbitrators could quickly gain the trust of arbitration users and reduce the desire of parties to seek only a very few well-known names.¹⁷⁶³

International arbitration practice has frequently seen the aversion of lawyers-turned-arbitrators to case management.¹⁷⁶⁴ Many arbitrators, when asked to expedite regular arbitration proceedings, are reluctant to rule against the party who requested a time extension or additional procedural steps for fear of recourse against themselves or their award for an alleged failure to observe due process. Regular arbitrators will often act with considerable caution, with the aim of providing the parties with a copper-bottomed process and award.¹⁷⁶⁵ Yet many respected commentators urge arbitrators to show more courage in the pro-active management of arbitrations.¹⁷⁶⁶ To remedy this requires institutions to set up educational programmes about FTA so that arbitrators' willingness to respond quickly, to accurately deal with swift

¹⁷⁶⁰ Trakman (2007) p. 19

¹⁷⁶¹ Okekeifere (1998) p. 81

¹⁷⁶² Najjar (2008)

¹⁷⁶³ Graving (1989) p. 319

¹⁷⁶⁴ Bernard (2010) p. 165

¹⁷⁶⁵ Lowenfeld (1999) p. 19-30

¹⁷⁶⁶ Sharp (1996) pp. 6-11

deadlines, and to ensure parties' compliance with FTA proceedings can be increased.¹⁷⁶⁷

5.3.2.3 Choosing Correct Institutional Supervision

Before adopting a model institutional FTA clause, parties should study the FTA rules of the institution being considered in order to choose those rules that are most suitable to their particular type of commercial relationship.¹⁷⁶⁸ As Silverman, the defending counsel of one FTA case observed, the success of fast-track procedure to a large extent depends the administrative capacity of the arbitral institution.¹⁷⁶⁹

Unfortunately the major institutional rules, like those of the ICC, the ICDR and the LCIA, have not adopted specific sets of FTA rules. The ICC and LCIA articles, for instance, only reduce time for the appointment of arbitrators but do not provide specific fast-track procedures.¹⁷⁷⁰ There is a scope for the wider application of FTA if these institutions adopt fast-track procedures.

While, in theory, some regional arbitral institutions provide rules and administrative support for international commercial arbitration, in practice they deal mainly with domestic arbitrations.¹⁷⁷¹ Parties rarely know what experience a particular institution has in assisting with international arbitration. That both parties and arbitrators are ready to conduct expedited procedures and available to do so but achieves less speed if the institution itself is not sufficiently experienced in administering international commercial arbitration to take the necessary procedural steps in a timely manner. For instance, in 2012 the Finland Chamber of Commerce (FCC) dealt with 163 parties but only 22

¹⁷⁶⁷ R. Graving, 'The International Commercial Arbitration Institutions: How Good A Job Are They Doing?' 5 in (1989) 4 Am. UJ Int'l L & P 319; 1

¹⁷⁶⁸ Nickles (1991) p. 143; See also Carter (1994) p. 785

¹⁷⁶⁹ Silverman (1993) p.113

¹⁷⁷⁰ See p. 157-159 Section 4.4.6.1

¹⁷⁷¹ Najjar (2010)

came from outside Finland.¹⁷⁷² By contrast, 133 out of 256 parties who were involved with SCC Arbitrations were international.¹⁷⁷³ Most of the institutions keep the record of their domestic and international arbitration cases but do not publish the number of FTA cases separately. Nevertheless, providing the number of international arbitrations indicates the international character of particular institutions. It is obvious that SCC conduct more international cases than FCC.

Some arbitral institutions simply may not be able to increase their involvement with international cases to gain the necessary experience in conducting international administration.¹⁷⁷⁴ They may be unable to recruit sufficiently experienced arbitrators onto their lists or to hire administrative staff with the experience of international commercial arbitration.¹⁷⁷⁵ For these institutions the only possible way to ensure better preparation and presentation for international FTA would be to appoint FTA arbitrators from a global list. These FTA arbitrators could then replace the inexperienced arbitrators on the young institution's list and provide proper administrative support.¹⁷⁷⁶ Currently, there is no such global list for experienced FTA arbitrators and each institution has to rely on its own list of arbitrators to conduct either regular domestic or international arbitrations. Having a global list of FTA arbitrators would be particularly useful in providing support in the preliminary stages of FTA.¹⁷⁷⁷ An experienced arbitrator can encourage parties to agree on undisputed pertinent facts and thereby considerably reduce the testimony. He can also define the arbitrable issue precisely and thereby better focus the later tasks of preparing written submissions and prehearing statements. This preparation of a global list of FTA arbitrators could help if institutions educate individuals on how to manage fast-track procedures without reducing the legal certainty and trust of ICA.

¹⁷⁷² 2012 Caseload of FCC available at <http://arbitration.fi/en/statistics/>

¹⁷⁷³ 2012 Caseload of SCC available at <http://www.sccinstitute.com/hem-3/statistik-2.aspx>

¹⁷⁷⁴ Mustill (1998) p. 17

¹⁷⁷⁵ Blessing (1989) p. 7

¹⁷⁷⁶ Sussman/Underwood (2011) p. 22

¹⁷⁷⁷ Mourre (2010)

There is no reason why a global list of FTA arbitrators cannot be created and education on FTA procedures cannot be given for this purpose. Each institution needs only to provide the names of the FTA arbitrators on their list that dealt with FTA cases in previous years.¹⁷⁷⁸ The current lists of arbitrators that arbitral institutions hold could provide the necessary framework for the creation of global FTA arbitrators list.¹⁷⁷⁹

Arbitral bodies should be more expedition-minded when providing FTA services. If parties are, for their own reasons, reluctant to keep a strict check on the way the arbitrators manage time, it is the role of arbitral institutions to step in and exercise such checks. This interrogation is legitimate; after all, one of the advantages of administered FTA versus ad hoc FTA is the supervisory function of the institution, which should ensure reliability of FTA procedures. The institutions should (if not already) train their Secretariat for the satisfactory advancement of fast-track proceedings. Where possible, they should seek to provide the same training to arbitrators.¹⁷⁸⁰

Professor Hans Smit went so far as to suggest that the major arbitral institutions can no longer meet the needs he perceives for improvement, and that, for this and other reasons, there should be 'a single global institution that would make uniformly improved processes and facilities available anywhere in the world', with existing institutions becoming simply 'branches' of the global international arbitration system.¹⁷⁸¹

However, the suggestions above for education programmes for FTA and the establishment of a global list of FTA arbitrators is not impractical and theoretical, it has a realistic potential to increase the wider scope of FTA.

¹⁷⁷⁸ Lord Hacking (2000) p. 37

¹⁷⁷⁹ Johnson (2003)

¹⁷⁸⁰ Najjar (2011) in a conference hosted by Corporate Counsel Institute - Europe (Coping with Heightened Regulations and the Need for Better Dispute Resolution)

¹⁷⁸¹ Smit, H. (1987) pp. 9-34

5.3.2.4 Changing the Habits and Perceptions of the International Arbitration Community

It is well within the power of the international arbitration community to break the habits and preconceptions of practitioners which make them reluctant to use FTA.¹⁷⁸² However, getting counsel, arbitrators and institutions to change their approach to FTA, and to modify their expectations as to how long is reasonable for each step to take, is unlikely to be achieved overnight.¹⁷⁸³

Currently, FTA is approached on the basis that it is perfectly acceptable to provide additional procedural steps and extend time limits so that arbitration takes between 6 months to 1 year from commencement to delivery of the award.¹⁷⁸⁴ This is still faster than the average duration of ICA which takes between 2 to 3 years to complete.¹⁷⁸⁵ However, if counsel, the tribunal, the institution (if applicable) and the parties agree that it will be dealt with on time, and are prepared to observe time limits, the default approach to all arbitration could become what is currently regarded as fast-track. FTA would then be offered as the usual starting point and only with good reason would the parties be steered towards the back-up position of regular procedures.¹⁷⁸⁶

Although introducing specific sets of FTA rules is not a prerequisite for the conduct of fast-track procedures, arbitral institutions should investigate methods of expediting arbitral proceedings whenever possible.¹⁷⁸⁷ For instance, there is a need to accelerate nomination procedures for arbitrators under all regular arbitration rules as the LCIA does in Article 5(4) in which the institution is mandated to appoint the entire arbitral tribunal "*as soon as practicable*" after receipt of the response.¹⁷⁸⁸ More particularly Article 9 of the LCIA Rules provides specific provision for shortening the time for the

¹⁷⁸² Mistelis (2004) p.525

¹⁷⁸³ Scherer, M., & Baizeau, D. (2009) pp.130-151

¹⁷⁸⁴ Magnusson (2001) p. 13

¹⁷⁸⁵ CI Arb Cost Survey 2011

¹⁷⁸⁶ Boxsell (2007)

¹⁷⁸⁷ Glaholt (2008)

¹⁷⁸⁸ LCIA Rules, Article 5(4)

formation of the arbitral tribunal *“in exceptional urgency, on or after the commencement of the arbitration”* which otherwise follows the standard formation procedures under the LCIA Arbitration Rules.¹⁷⁸⁹ It authorises the LCIA Court, in its complete discretion, to ‘abridge or curtail’ any time limit contained in the rules concerning the formation of the tribunal.¹⁷⁹⁰

Each party should be ready to nominate its arbitrator within a few days, and challenges should be required within 24 hours or a similar limited time frame.¹⁷⁹¹ An arbitration clause that urges the arbitral tribunal to issue the award *“within three months after appointment of the chairman”* or *“within six months from the constitution of the arbitral tribunal”* certainly does not have its full intended effect if, due to various challenging procedures, the appointment of the chairman or the constitution of the arbitral tribunal takes months to conclude.¹⁷⁹² Indeed, after the expeditious appointment of the arbitral tribunal, counsel and the arbitrators should not slip into the default mode of regular arbitration and adopt a leisurely timetable.¹⁷⁹³ There is scope for increasing the use of FTA if more regular arbitration rules are convertible to full-blown fast-track procedures. Converting to FTA in this way could see the process completed in three to six months, rather than two to three years, as is the norm in regular arbitration.¹⁷⁹⁴

¹⁷⁸⁹ LCIA Rules, Article 9

¹⁷⁹⁰ *Ibid*

¹⁷⁹¹ Andreeva (2008)

¹⁷⁹² Scherer (2005) p. 229

¹⁷⁹³ Bagner (1997) p. 193

¹⁷⁹⁴ Berger, K. P. (2008) p.610

5.3.1 Reducing the time and cost of producing the award

Another common criticism of ICA is that tribunals take too long to render awards.¹⁷⁹⁵ This is despite the fact that courts have consistently held that arbitrators have no obligation to provide written explanations of their decisions, and although arbitration awards have no precedential value.¹⁷⁹⁶ According to respondents of the 2012 SIA/WC survey, tribunals took unjustifiably long to render awards in 28% of arbitrations. Unsurprisingly, arbitrators believed this happened in only 12% of their arbitrations, whereas private practitioners and in-house counsel think this happened in 32% and 33% of their arbitrations, respectively.¹⁷⁹⁷

Awards may be longer than necessary because arbitrators are writing lengthy opinions and this has become a standard practice after international arbitral proceedings.¹⁷⁹⁸ Unless parties specifically agree to unreasoned awards this also true after FTA proceedings. There are four main reasons for lengthy reasoning:

First, arbitrators are trying to demonstrate that due process has been observed during the conduct of FTA procedures, even though this may be unnecessary.¹⁷⁹⁹ The Arbitrator's personal concern to reduce the possibility of annulment of his FTA award has led to the writing of both pre- and post-hearing briefs, modelled after regular arbitration proceedings.¹⁸⁰⁰ Many arbitrators are simply not ready to accept the undertakings given by court judges, inside and outside the courtroom, that even drastic action by arbitrators to speed up a case will not be treated as want of due process.¹⁸⁰¹

¹⁷⁹⁵ Naimark/Keer (2005) p. 95

¹⁷⁹⁶ Jarvis (1985) p. 37

¹⁷⁹⁷ 2012 SIA/WC Survey p. 39

¹⁷⁹⁸ House/Corgan (1991)

¹⁷⁹⁹ Rogers (2001) p. 348

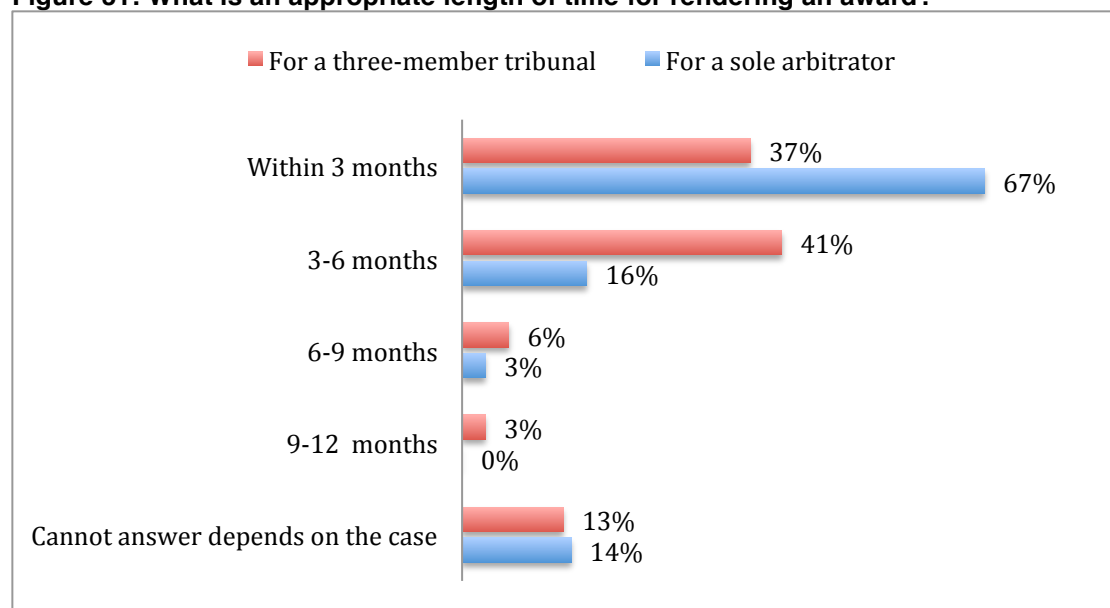
¹⁸⁰⁰ Davis/Smit/Brown/Affaki/et al. (1994) p. 358

¹⁸⁰¹ Kaufmann-Kohler/Peter (2001) p. 195

Second, writing a long opinion or a dissent in a three-member arbitral tribunal entitles the arbitrator to ask for a larger fee for his services.¹⁸⁰² Third, it is through writing up their opinions, that arbitrators build up the vital track record on which parties rely when choosing their arbitrator.¹⁸⁰³ Fourth, institutional control mechanisms such as secretaries of Courts of Arbitration (like the ICC's award scrutiny process) encourage lengthy reasoning by demanding strict compliance with formalities.¹⁸⁰⁴ They should instead try to support the fast track nature of the proceedings.

The 2012 SIA/WC survey reports two thirds (64%) of respondents have never used the issuance of an unreasoned award as a method of expediting arbitral proceedings. This shows that there is great scope for improvement.¹⁸⁰⁵

Figure 31: What is an appropriate length of time for rendering an award?



Source: 2012 SIA/WC Survey p.39 charts 41

Different expectations about the appropriate length of time for rendering an award need to be encouraged. Two-thirds (67%) of respondents' believed it was acceptable for a sole arbitrator to render an award within three months

¹⁸⁰² McLaren (2002) p. 473

¹⁸⁰³ Hartwell/Geoffrey (1998)

¹⁸⁰⁴ McGovern (1994) p. 46

¹⁸⁰⁵ See supra p. 268 figure 22

after the closure of proceedings. This acceptable period might well be reduced given that most FTA rules provide overall time-limits of three months for the issuance of the award from the establishment of the arbitral tribunal. Similarly, for three-members tribunals, one-third (37%) of respondents believed that the award should be rendered within three months. Again, this view needs to be shifted if FTA is to be used more widely. Interestingly, about 13% respondents stated that it depends on the case.¹⁸⁰⁶

In order to improve the scope for the wider application of FTA there also needs to be research on the global enforceability of summary awards.¹⁸⁰⁷ In the meantime, arbitrators should be trained to keep cost and time at a minimum when rendering reasoned awards.¹⁸⁰⁸ For example, prior to the hearing some arbitrators prepare for themselves sections of the draft award on the basis of the written submissions of the parties. The arbitrator may be able to proceed a long way in such a draft, subject to what is learned at the hearing.¹⁸⁰⁹ After the hearing, the arbitrator who immediately drafts the award with the issues still fresh in his mind may save substantial amounts of time.¹⁸¹⁰ Of course, this requires prior preparation of schedules to set aside the necessary time. Even where it appears necessary that partial or interim awards are to be made, the same process of thorough preparation, focus, and immediate response is needed in FTA. The end result of all this effort is a well-reasoned award rendered with appropriate speed which boosts parties' confidence in entering into an FTA agreement.¹⁸¹¹

However, some issues about the award are beyond the arbitrator's control. The ICC may send an award back and forth many times until it is convinced of its quality.¹⁸¹² In addition to the combined efforts of parties, counsel, and arbitrators, successful FTA also requires an appropriate environment like an

¹⁸⁰⁶ SIA/WC Survey 2012 p. 39

¹⁸⁰⁷ Scherer (2010) para 50.03

¹⁸⁰⁸ Scherer/Baizeau, D. (2009) p. 130

¹⁸⁰⁹ Butler (1994) p. 287

¹⁸¹⁰ Zuberbühler/Muller/Habegger (2005) p. 351

¹⁸¹¹ Davis (1992) p. 176

¹⁸¹² McGovern (1994) p. 47

institution that will act quickly to reconcile different points of view occurring during the case.¹⁸¹³

5.3.2 Cases resistant to the application of FTA

Although FTA is trying to prove itself to be an effective means of resolving international commercial disputes, it is by no means a panacea.¹⁸¹⁴ Like all forms of dispute resolution, it has its drawbacks which render it less suitable than other forms of dispute resolution in certain contexts.¹⁸¹⁵ Because FTA involves a very tight timetable, with limited flexibility to extend time limits, this can give rise to difficulties in substantial, complex or document heavy cases.¹⁸¹⁶ For these types of disputes, increasing the scope for FTA is a much more difficult task. At the end of the day, it is crucial for reasons of enforceability, that the award be rendered at the appropriate pace for the specific circumstances.¹⁸¹⁷

Large and complicated disputes

These may take many months or even years to reach the stage of an award in the case of arbitration. They are not usually suited to being resolved in the shorter time limits contemplated by FTA Rules. This may be the case where the dispute concerns a project requiring an in-depth post-mortem.¹⁸¹⁸

Disputes involving a government

Allegations against governmental bodies usually need to be supported by bureaucratic steps whose slowness and need for extensive documentation prohibits the short time frame required for FTA.¹⁸¹⁹ Thus for example, fast-track procedures are inappropriate to resolve investment treaty disputes

¹⁸¹³ Davis/Smit/Brown/Affaki/et al. (1994) p. 358-475

¹⁸¹⁴ Davison, M., & Nowak, L. (2009) p. 169

¹⁸¹⁵ Barrington (2009) p.39

¹⁸¹⁶ Gaillard, E. (1998) p. 31

¹⁸¹⁷ Stipanowich (2008) p. 383

¹⁸¹⁸ Müller (1998) p. 16

¹⁸¹⁹ Rivkin (2008) p.382

where government agencies, ministries and ministerial officers are involved.¹⁸²⁰

Multi-tiered Dispute Resolution Clauses

These clauses, which try to encourage the parties to resolve their disputes amicably, are now common in international commercial contracts.¹⁸²¹ In particular, mediation, in all its various permutations, is becoming an increasingly popular non-adversarial means of attempting to resolve commercial dispute before they blow up into full-scale warfare between the parties.¹⁸²² Where, however, ADR Rules apply before FTA, the process of FTA is often impeded after the dispute has arisen. By requiring a party to “cool off”, or explore whether there is room for compromise or agreement, the potential speed of FTA may be lost.¹⁸²³

Interim Measures

In a similar vein, there is usually no need for interim measures under an FTA procedure.¹⁸²⁴ Because the arbitration must be quick and interim awards tend to be challenged, the decision for “fast-track” arbitration is a decision against interim measures.¹⁸²⁵ In any case, duplication should be avoided as it may seriously impede the positive effects of fast track procedures. Interim awards are likely to propel an attack in court and therefore completely undermine the fast track scheme.¹⁸²⁶

In certain circumstances forgoing FTA and expediting regular arbitration may be the quickest way to get things done.¹⁸²⁷ The clearest examples are disputes which need to be supported by copious expert evidence or extensive

¹⁸²⁰ Lalive (2009)

¹⁸²¹ Lowenfeld (1997) p. 649

¹⁸²² Stipanowich/Kaskell (2001) p.5

¹⁸²³ Dobbins (2005) p. 159

¹⁸²⁴ Rennie/Sherwin (2010)

¹⁸²⁵ Sherwin, & Rennie (2009) p.367

¹⁸²⁶ Kreindler (1998) p. 184

¹⁸²⁷ Slate (2010) p. 195

discovery or that require the testimony of many witnesses.¹⁸²⁸ If serious allegations are made, supported by expert evidence, the responding party may well be put at a disadvantage if it is not given the opportunity to explore whether another expert is able to counter the evidence of the referring party's expert.¹⁸²⁹ For this reason, unless the timetable and procedural steps for the fast-track procedure are substantially relaxed, FTA is often considered an unsuitable forum for large complex disputes.¹⁸³⁰ Similarly, where large amounts of money are at stake, protracted and refined arbitral procedures are not superfluous.¹⁸³¹ However, there is no reason why less complex disputes with high value claims arising from an international contracts may not be brought to FTA and dealt with satisfactorily.¹⁸³²

5.3.3 Dispute ideally suited to FTA

Arbitration literature contains many observations on the suitability of FTA to particular types of dispute. Gaillard, for instance, concedes that fast-track arbitration may not be suitable in all cases and should perhaps be used only when time is of the essence for the parties.¹⁸³³

The type of contracts where time is of the essence and FTA is a natural choice have been identified by Yves to include disputes arising out of financial transactions such as loans, securities, derivatives, banking and broker transactions. These normally involve issues of default that can be resolved relatively quickly.¹⁸³⁴ According to Lew, disputes over price and quality determination are good examples of issues which both warrant and are

¹⁸²⁸ Hanotiau (2011) p. 100

¹⁸²⁹ Japaridze (2008) p.1415

¹⁸³⁰ Tschanz (1993) p.56; Newman/Burrows (1994) p. 3, col. 1; Ballem (1991) pp. 152-53) Silverman pp.154-158; Watkiss (1991) pp. 150, 151

¹⁸³¹ Rubino-Sammartano (1990) pp. 25-30.

¹⁸³² Arias (2010)

¹⁸³³ Gaillard/Savage (1999) p. 681 section 1281

¹⁸³⁴ Rubinstein (2009)

capable of fast-track arbitration.¹⁸³⁵ Sports disputes can also be resolved within a few days for Paulsson¹⁸³⁶ who also commented on the suitability of ICANN disputes for fast-track arbitration.¹⁸³⁷ For Arias¹⁸³⁸, 'Cinderella arbitrations' involving small claims are ideally disposed of on a fast-track basis.

Broichmann¹⁸³⁹ suggests pre-closing mergers and acquisitions disputes are suitable for fast-track procedure.¹⁸⁴⁰ Rosso & Dorgan¹⁸⁴¹ illustrated the suitability of fast-track arbitration in the electricity industry where the parties cannot wait one or two years for an award to settle their dispute. All of these disputes are time sensitive and demand the expedition that fast-track procedure can provide.

Large, high value disputes should be considered carefully before FTA is embarked upon, but otherwise there is a scope for wider FTA application. Indeed, the majority of international commercial disputes should be capable of satisfactory determination by way of FTA.

5.4 Concluding Remarks

Despite the increasing complexity of international commercial disputes, FTA can be made more suitable for their resolution once practitioners have become accustomed to fast-track procedures.¹⁸⁴² In most cases, less time to decide a case does not result in a lower quality arbitral award. This is mainly because in FTA procedures all participants are compelled to focus on the key

¹⁸³⁵ Lew/Mistelis/Kröll (2003) p. 549 ¶21-87

¹⁸³⁶ Paulsson (1993) pp. 359-370; Paulsson (1994) pp.713-717

¹⁸³⁷ Paulsson (2008) pp.1-20

¹⁸³⁸ Arias (2010)

¹⁸³⁹ Broichmann (2008)

¹⁸⁴⁰ Kaufmann-Kohler (2005) p.631

¹⁸⁴¹ Rosso/Dorgan (2002)

¹⁸⁴² Overcash/Gerdes (2009) p.34

issues to be determined by the tribunal, rather than allowed to turn over every stone.¹⁸⁴³

The NYC, national arbitration legislation and the interpretation fast-track procedures by national courts generally support FTA awards, so what is required is not setting up specific sets of FTA rules, but educating the international arbitration community.¹⁸⁴⁴ Judging by the level of complaints from clients, FTA without institutional supervision does not seem to work in the resolution of international commercial disputes.¹⁸⁴⁵

There are certainly scenarios that do not encourage a belief in the wider scope for FTA. For example, if a party goes through lengthy and costly proceedings only to find the FTA award is not enforced.¹⁸⁴⁶ As we saw in the second part of this chapter, FTA proceedings involve many risks such as damaging applications of mandatory rules, public policy or narrow interpretation of the NYC in the *lex arbitri* or at the place of enforcement. The laws regulating the enforcement of arbitral awards becomes less and less predictable and as a result FTA awards are not consistently enforced across the globe.¹⁸⁴⁷

The NYC made enforcement of foreign arbitral awards generally considerably easier, but still there is an obvious lack of uniformity.¹⁸⁴⁸ Being unable to determine if FTA will be enforced by different countries is obviously detrimental for the wider application of FTA. Dissatisfied parties enjoy various options to resist the enforcement of an FTA award. Therefore, FTA proceedings are suspected of reducing guarantees offered by international arbitral awards: a final and binding award.¹⁸⁴⁹

¹⁸⁴³ Kreindler (1998) p. 183

¹⁸⁴⁴ Baizeau(2009)

¹⁸⁴⁵ Carter (2011)

¹⁸⁴⁶ Morton (2010) p. 113

¹⁸⁴⁷ Maurer 2012) p. 331

¹⁸⁴⁸ *Ibid*

¹⁸⁴⁹ Andreeva (2008)

This is not a big problem in arbitration friendly countries like England, Switzerland and France, where courts have been very supportive of the expedited arbitration process, unless it clearly violates the rules of due process.¹⁸⁵⁰ In these countries the success rate of the enforceability of FTA awards is very high.¹⁸⁵¹ This gives parties and arbitrators the confidence to conduct expeditious arbitrations in these countries.¹⁸⁵² There is a scope for the wider application of FTA in other countries that are less FTA friendly if they can be encouraged to improve their legislation and reduce the risk of FTA awards not being enforced.

In this respect, it is important to emphasise that articles V of the NYC and Articles 34 and 36 of the UNCITRAL Model Law provide that a national court *may*, refuse enforcement; it is not obliged to. Thus, even if the resisting party proves there are grounds that justify refusal of the FTA award under the NYC/UNCITRAL system, the court retains the discretion to enforce the award. This creates a clear presumption in favour of enforcing FTA awards and many NYC/UNCITRAL member countries have endorsed this.¹⁸⁵³

However, in less arbitration friendly countries procedural elements of FTA may be seen contrary to their public policy according to Article V(2) exceptions to the recognition and enforcement of arbitral awards; in these cases each country reserves the right for its courts to exercise ultimate control over the FTA process and awards.¹⁸⁵⁴

The potential of the public policy exception under Article V(2)(b) to frustrate the goals of fast-track procedures and the recognition and enforcement of FTA awards has long troubled parties, lawyers, and arbitrators. Public policy is often compared to an "unruly horse", which may lead us from sound law. Some recent developments, especially in India, but also in other economically

¹⁸⁵⁰ Cole (2010)

¹⁸⁵¹ Scherer (2010)

¹⁸⁵² McIlwrath/Savage (2010) p.225

¹⁸⁵³ McIlwrath (2010) p. 535

¹⁸⁵⁴ Harris (2007) p. 10

upcoming countries, may even indicate more trouble since these countries seem to expand the definition of public policy far beyond general international practice.¹⁸⁵⁵

Successful challenges to enforcement of the award under both Article V(1)(b) and Article V(2)(b) have established that equality of treatment and the right to be heard are fundamental values whose breach results in an unenforceable award; the speed of FTA procedures increases such risks.¹⁸⁵⁶

In certain countries a time limit for rendering awards defines the arbitrators' mandate and an award rendered after this mandate has expired may be refused enforcement.¹⁸⁵⁷ Thus it is necessary to consider those countries which may have mandatory time limits or sanctions in their national laws for parties who do not respect the time-limits for FTA.¹⁸⁵⁸

Concerns over the enforceability of FTA awards are a serious limitation to increasing the scope of application of FTA in international commercial arbitration.¹⁸⁵⁹ In order to facilitate the use of FTA, improvements should be made to existing arbitration laws, institutional FTA rules and procedures. In the meantime parties should be aware of the pitfalls that they might encounter if they decide to adopt fast-track procedures.¹⁸⁶⁰

¹⁸⁵⁵ ICCA's Guide to the Interpretation of the 1958 New York Convention : A Handbook for Judges. (2011) p. 107

¹⁸⁵⁶ Park (2007) p. 77

¹⁸⁵⁷ Poudret/Basson (2004) pp. 309-403.

¹⁸⁵⁸ Kaufmann-Kohler/Peter (2001) p. 210

¹⁸⁵⁹ Craig/Park/Paulsson (1990) § 9.01 at 158.

¹⁸⁶⁰ Kreindler (1998) p. 181

5.5 Recommendations to increase scope of FTA

There is no single recommendation which can increase the scope for the wider application of FTA in the resolution of international commercial disputes. Rather, a collective effort from different stakeholders involved in each step of the fast-track arbitral process is required.¹⁸⁶¹ This thesis makes the following suggestions in order to increase the scope of FTA in international dispute resolution.

- 1) The national law governing FTA and the applicable arbitration rules should regulate the court's involvement in FTA proceedings. The English Arbitration Act of 1996 is a good example, which correctly stipulates as an underlying principle that the court should not intervene with arbitration proceedings unless otherwise expressly provided by the law. This approach can be implemented in less arbitration friendly legislation so that court intervention is minimised in order to avoid parallel proceedings that may hinder the fast-tracking of international arbitral proceedings.¹⁸⁶²
- 2) There should be a proper allocation of powers related to FTA between the arbitral institutions, the arbitration tribunal and the national courts. In general the national courts enjoy wide-ranging powers in supervising or assisting in ad hoc FTA. However, with the increasing use of institutional FTA, it is desirable to shift some of those court functions to the arbitration institutions. For instance, national law may delegate the power to decide on jurisdictional issues to the arbitration institutions, under whose auspice the arbitration proceedings are to be monitored. Under the Chinese Arbitration Law of 1995, either of

¹⁸⁶¹ Freyer (1998) pp. 104

¹⁸⁶² Park (2011) pp. 314

the parties may, instead of going to the court, raise a jurisdictional plea concerning arbitration before the arbitration body, which is believed to be quicker and more capable of dealing with these issues than the national court.¹⁸⁶³

Another area is the allocation of powers between arbitration institutions and the courts in appointing and replacing arbitrators. For the same reason it would be better to empower permanent arbitration institutions to appoint arbitrators, to decide on challenges, and to replace arbitrators. In line with this understanding the Hong Kong Arbitration Ordinance 1996 provides that the HKIAC may serve as an appointing authority in lieu of the court.¹⁸⁶⁴

- 3) It is vital to standardise shortened time limits to be applied to the various stages of FTA proceedings and auxiliary judicial proceedings. The national law, the arbitration rules and the parties' agreement may serve to this end. Time limits may occasionally make international arbitration proceedings inflexible but they provide consistency for parties. In practice parties commonly approach the court to apply for assistance or intervention only to discover that the court delays the procedure intolerably because the court is not subject to any time limits.¹⁸⁶⁵
- 4) The time has come for arbitrators and arbitral institutions to take on a more enhanced active role in FTA proceedings. This would replicate the role of judges in many jurisdictions who in recent years have had to accept more responsibilities in pre-trial, discovery and document production, and become more involved in dealing with expert witnesses. The over-riding goals of FTA

¹⁸⁶³ Chang (1998) p.178

¹⁸⁶⁴ *Ibid*

¹⁸⁶⁵ Scherer/Baizeau (2009) pp.130-151

demand that arbitrators and arbitral institutions adapt to the complex challenges that are now present in ICA. To increase the scope of FTA the roles of arbitrators and arbitral institutions have to become more pro-active in nature.¹⁸⁶⁶

At the very least provider institutions should begin to conduct training in managing FTA fairly but expeditiously with particular emphasis on ways of reducing cost and promoting speed. Arbitrators should be required to complete training in expedited arbitration management before being included on a given providers list, and to update their knowledge and skills annually.

Arbitrators should endeavour to improve their conduct of FTA proceedings. A party aggrieved by malpractice or mishandling of fast-track procedure by arbitrators may turn to the court for help, either in the course of FTA or after the completion of proceedings. This will inevitably delay or disrupt fast-track proceedings.¹⁸⁶⁷

- 5) An economic and speedy FTA is one without dilatory tactics. But in numerous cases dilatory tactics can be employed in almost every stage of FTA proceedings. This can be reduced if arbitrators and arbitral institutions are empowered to tackle delay in commencement of the FTA proceedings by the arbitration institutions or the appointing authorities, delay in the submission of arbitration documents by the parties or their counsels, delay in organizing the necessary arbitration hearings or deliberations among the arbitrators, and delay in making procedural constraints, observing time-limits and rendering FTA arbitral awards. Arbitration institutions and arbitrators should

¹⁸⁶⁶ Slate (2010) p. 195

¹⁸⁶⁷ Okekeifere (1998) p. 143

accept these responsibilities in fast-tracking international arbitration proceedings.¹⁸⁶⁸

- 6) This thesis appreciates the specific sets of FTA Rules created by arbitration institutions which expressly lay down fast-track procedures. The institutional court or board plays an important role in expeditiously reviewing challenges to arbitrators and a monitoring of arbitrator's performance without affecting their ultimate independence and decision making power. Institutional supervision has eliminated many procedural defects in FTA and increased the likelihood of enforceable FTA awards.
- 7) Last but not least, publishing FTA awards as well as the outcome of judicial proceedings that review the FTA awards, can help to increase mutual understanding of participants on the practical implementation of FTA. So that others could avoid making same mistakes and spending unnecessary cost and time. With so many lessons that can be studied, it becomes more and more apparent that making FTA awards available may help the national courts to increase the awareness of the importance of respecting fast-track procedures and to become familiar with FTA practice, which in turn will inspire the judicial personnel to consider FTA favourably for international commercial dispute resolution. Conversely, a lack of familiarity with FTA may hinder judicial personnel to perform their duties promptly in assisting FTA. Publishing judicial proceedings that review FTA awards is bound to help the courts, the arbitrators and parties to make practical assessments on the potential pitfalls of FTA proceedings, encouraging inefficient proceedings

¹⁸⁶⁸ Ulmer (2010) p. 249

to be changed and to promote more widely those proceedings which are most efficient.¹⁸⁶⁹

Initiatives which arbitral institutions may offer to increase the scope for wider application of FTA include:¹⁸⁷⁰

- 1) publish and promote the use of institutional FTA rules
- 2) offer rules that set presumptive deadlines for each phase of the arbitration and fast-track procedural steps; train arbitrators in the importance of enforcing stipulated deadlines and observing fast-track procedural steps.
- 3) use the allocation of costs to encourage efficient conduct of the FTA proceedings
- 4) keep developing fast-track procedures that promote procedural shortcuts, expedited motion practice
- 5) develop and publish rules that provide effective ways of limiting document production to essential information
- 6) provide for expedited appointment of arbitrators and require arbitrators to confirm their availability
- 7) keep parties and their counsel informed about FTA procedures and ask their opinion about how to increase the use of FTA.

Finally, we offer a list of initiatives for arbitrators considering or involved in FTA proceedings:¹⁸⁷¹

- 1) If a party inquires whether an arbitrator is prepared to act under FTA Rules the arbitrator should confirm the general nature of the dispute and the expected volume of the file before accepting.
- 2) The arbitrator should only accept if time wise he is available within the specified shortened time limits and able to render an award expeditiously. The tribunal must be candid about its availability.

¹⁸⁶⁹ Chang (1998) p.179

¹⁸⁷⁰ Slate (2010) p. 196

¹⁸⁷¹ Scherer (2005) p. 237

- 3) Once the arbitrator accepts the appointment he should not step down.
- 4) The tribunal should draw up a realistic procedural timetable as soon as possible, abide by it themselves, and monitor and enforce compliance by the parties.
- 5) The tribunal should be aware of the extreme pressure on parties and their counsel. They cannot have the same expectations regarding substantiation and evidence as in normal proceedings. They should bear in mind that the Claimant usually has had much more time to prepare its case than the Respondent.
- 6) The tribunal should quickly get a good grasp of the file and the relevant issues. It is recommended to give directions on what issues they wish the parties to deal with in their briefs and at the hearing (if any).
- 7) If the circumstances require, the tribunal should apply for an extension to the Chambers (for instance in the case of indispensable evidence and in order to preserve the parties' right to be heard).

This is not an exhaustive list of recommendations.

6 CONCLUSION

6.1 Chapter Conclusions

In order to answer the questions raised at the start of this thesis, a string of issues was explored relating to the wider application of FTA in the resolution of international commercial disputes.

In the first chapter we began by examining the importance of speed and economy in the development of ICA. We contended that speed and economy had always been the core value of international dispute resolution but this changed after the codification and harmonization of ICA arbitration rules and laws. New fundamental values, such as adaptability, flexibility, finality and enforceability, promoted through the influence of the NYC and the UNCITRAL Model Law, became more important than saving cost and time in international dispute resolution.

In the second chapter we examined problematic areas of ICA in relation to cost and delay. We showed that concerns for slowness and expense were at a peak between the late 1980s and early 1990s. We then analysed criticisms that ICA had become too costly and too slow to adequately resolve international commercial disputes. The chapter also considered that minimising cost and speed is not paramount for complicated and large scale disputes. For those kinds of disputes, finality and enforceability is more important. We established the real problem is for parties involved in mid-size and small size arbitrations who desperately need time and cost saving and awards which are final binding and enforceable.

To determine when the duration and cost of ICA is excessive we looked at the reasons for cost and delay. These included dilatory tactics, different cultural and legal backgrounds, Americanisation of ICA and, most important of all, the behaviour of international participants.

In the third chapter we considered the variety of methods available for expediting international arbitration. These included parties' and arbitrators' autonomy to create streamlined arbitration; revisions of institutional rules and arbitration legislation; and the influence of an increasing number of arbitration laws, rules and reports. These methods were identified to disprove the view that long delays and excessive costs are inevitable in international commercial arbitration.

However, resolving some types of cross-border disputes requires more speed and economy than can be achieved within the framework of regular arbitral proceedings. While regular procedures have strengths and weaknesses in dealing with cost and delay they will not provide truly fast-track procedures unless parties specifically agree to them.

In the fourth chapter, we turned specifically to FTA, showing how FTA proceedings are used in many different ways to increase speed and economy. We analysed a great number of fast-track procedures, including shortened time limits, procedural constraints, and abbreviated proceedings. We considered several types of FTA models including ad hoc FTA rules, specific sets of FTA rules, and FTA under regular arbitration rules, and discerned the common element of FTA provisions in these various settings. We then identified the strengths and weaknesses of the various FTA proceedings.

Having discussed the elements of FTA, we investigated how the international arbitration community has sought to balance the core principles of due process against the parties' freedom of contract. We identified that such a balance may be upset by parties when bargaining for speedy and economic conduct of arbitration, by arbitral institutions when providing rules for the expedited conduct of arbitral proceedings, by the arbitrator when conducting expedited procedures, and ultimately by the public court when charged with deciding on challenges to the enforcement of an award. We also gave many

examples of how FTA procedures may be accelerated without reducing due process rights.

We identified that specific sets of FTA Rules seem to provide a good compromise between speed and due process. Institutional provisions ensure speed and cost-efficiency but the rules also make a clear allowance for the parties' right to be heard: First, almost all FTA Rules provide procedural shortcuts "in principle", which means that further procedures may be submitted in appropriate circumstances, and there are no time limits set in advance by the rules for the submission of briefs. Second the default rule under most FTA provisions is a single or a limited hearing for the examination of witnesses and for oral argument, unless both parties agree that the Tribunal should decide on the basis of documentary evidence alone. Third, FTA rules apply automatically to all cases where the amount in dispute is below a certain monetary threshold, "*unless the Chambers decide otherwise, taking into account all relevant circumstances*". Fourth, under most FTA Rules, the case must be heard by a sole arbitrator unless the parties initially agreed and continue to insist on a three members tribunal. Finally, the overall time limit to render the award may be extended in exceptional circumstances, a condition agreed among practitioners to be strictly but not unreasonably applied by the Chambers.

Chapter 5 contrasted the arguments in favour of using FTA more widely in international commercial cases with reasons to be sceptical about its utility.

In the first part, we observed that parties are eager to use FTA in principle but fearful to use it in practice. We saw that fast-track arbitration is not an improvement if it results in awards which cannot be enforced or decisions which are not conductible in practice. In order to increase the scope for wider application of FTA parties need to trust in the effectiveness of FTA proceedings.

In the second part we tried to clarify whether one of the common criticisms of fast-track procedures is justified, namely, whether FTA compromises due process. We concluded that there is indeed a risk that FTA fails to guarantee due process, in particular for respondents, and that awards are therefore more likely to be annulled. Contributing factors to this risk include: arbitrators selected for FTA who may be passive towards fast-track procedures; the applicable arbitration law of the country in question which may apply mandatory timescales and prescribe what procedures may or may not be fast-tracked; international conventions on arbitration that aim to ensure that arbitral proceedings are conducted fairly but which may give unpredictable results if narrowly interpreted.

We gave many examples of court decisions that have set aside awards on the basis of FTA provisions that violate due process but also many that support FTA awards. In ICA each legal environment brings with it a panoply of advantages and disadvantages. These should be carefully measured to determine if one should adopt a FTA clause, with whom to apply for arbitration, where to situate an FTA, the likelihood of the award being enforceable and what law is to be applied to the fast-track procedure.

Most nations recognise the importance of FTA for international trade and have enacted arbitration friendly laws whereby an FTA award is only required to meet with minimum standards of due process. Once the dispute has arisen the central concern is the will of the parties to proceed expeditiously. A carefully defined FTA clause in the appropriate legal environment may assist the parties in focusing on the dispute that is of key importance to both of them. Where difficulties arise, state court assistance can be found in certain settings, but this may lead to untoward state court intervention. The arbitral institutions play an important role in assisting FTA by their responsiveness and also by aiding the integrity of the fast-track process under their rules. At the heart is the arbitral tribunal, fashioning the fast-track procedure that reduces parties due process concerns and leads to an enforceable award.

We also considered how the effectiveness of FTA is affected by the nature of the dispute to be decided, the extent to which the issues involve complex questions of law and fact, and the objectives of the parties concerned.¹⁸⁷²

We showed that without a detailed study of the matters likely to affect fast-track procedure, one could easily be misled into believing that simply setting out FTA rules and procedures will provide speed and economy in practice and therefore conclude the scope of FTA may be increased.

In the final part of the Chapter five we gave suggestions on how to improve the scope for the wider application of FTA. If FTA is conducted in a professional manner there is no reason why fast track arbitration should not be regarded as an efficient and fair dispute settlement procedure and the traditional objections to such accelerated arbitration can be dispelled. Furthermore, due process rights can be upheld equally, if not in some aspects more in fast track arbitration than in regular arbitration. Provided the arbitrator safeguards the minimal requirements of due process, thereby ensuring that the benefits of FTA proceedings are not perverted (e.g., by exposing the ensuing award to rescission or non-enforceability on the basis of grave procedural shortcomings), he may well disprove those who might be tempted to claim that, with respect to fast track arbitration nobody running at full speed has either a head or a heart.

¹⁸⁷² [Conference: Fast-track arbitration: an idea whose time has come? (2009)]

6.2 Analytical Conclusion

Although there is no perfect solution to increasing the effectiveness of FTA procedures, there is certainly scope for the wider application of FTA. Each dispute constitutes a distinct case with its own character and there will always be those disputes which are not suitable for fast-track procedures. But this is not a limit, rather it is an opportunity to increase the scope for the wider application of FTA. The modern business community demands more dynamic means of dispute resolutions and requires from arbitral institutions more differentiated services for speed and economy. In the 1990s FTA proved that ICA need not always be costly and lengthy. In the 2000s the proliferation of specific sets of FTA Rules proved an effective way increasing the scope for the wider application of FTA proceedings and in the 2010s the institutions have begun to offer new developments to their rules. Some have increased the monetary limit for the automatic application of FTA and others have given more authority to the arbitral institution to determine the applicability of FTA procedures. If arbitral institutions worldwide continue to revise their existing arbitration rules, adopting specific sets of FTA rules and introducing new provisions where necessary, there is scope of the wider application of FTA.

We offered that creating a global list of FTA arbitrators, educating practitioners on FTA procedures, and engaging business users more in the creation of FTA rules would help to increase trust in the use of fast-track procedures. However, these suggestions are mostly theoretical. The arbitral society cannot continue to respond to the requests of fast-track procedures without increasing the practical application of FTA. It has to keep listening to the voices demanding changes and increased efficiency. At the end of the day, business people will choose the solution they find most suitable — it is the task of the arbitral society to provide such a solution for them.

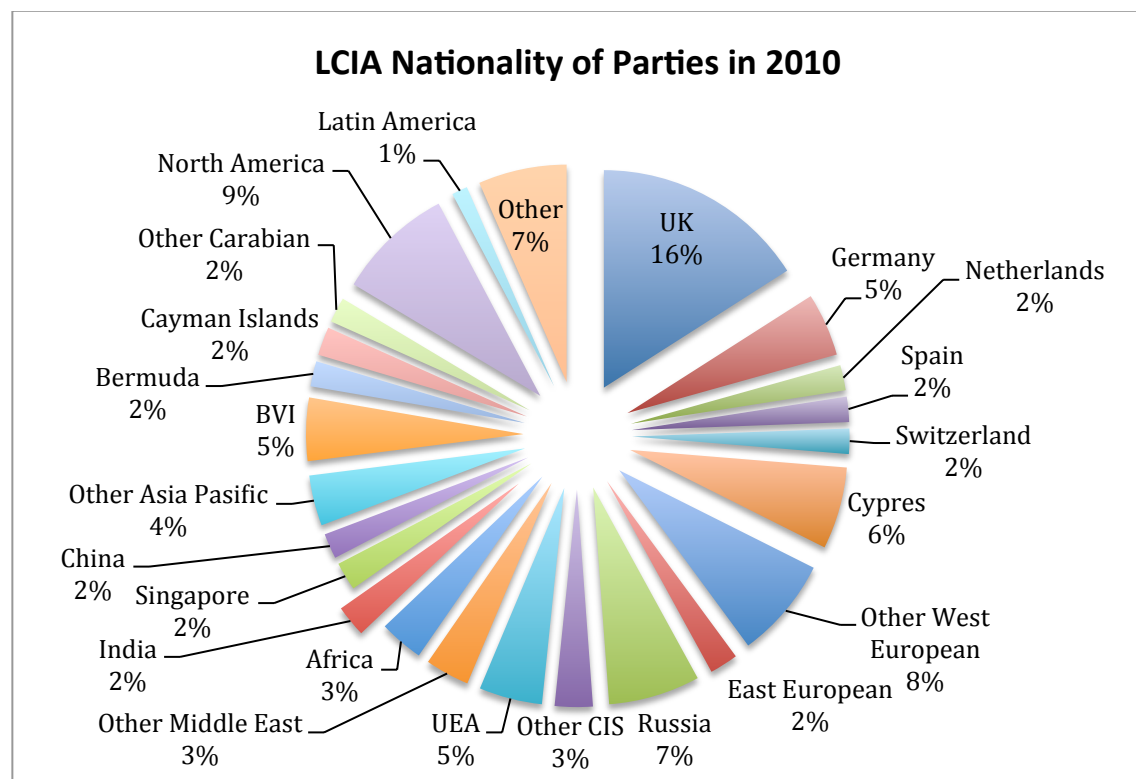
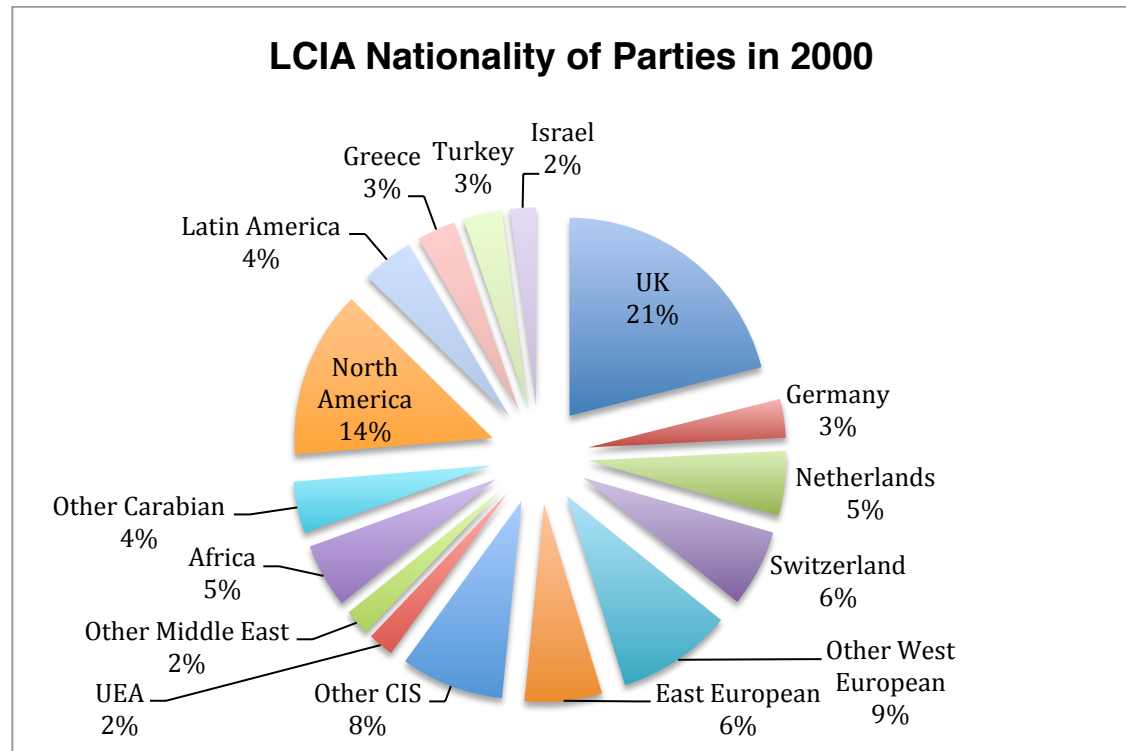
Increasing the scope of FTA in international commercial arbitration is possible but it will not be achieved by improvements only in arbitration friendly countries. The initiative lies in the hands of international arbitrators and practitioners. Despite its practitioners' legal and cultural differences, the practice of international arbitration is increasingly subject to harmonization. It is becoming supra-national and the suggestions to improve the scope of FTA must also be supra-national.

Obviously, FTA will not be suitable for every contract or for every field of international trade. However, international commercial arbitration bodies must remain attuned to the regularly voiced desire for speedy and economic dispute resolution methods. By continuously developing their institutional FTA rules and by educating practitioners to successfully conduct FTA, the international arbitration community can easily contribute to the wider application of FTA

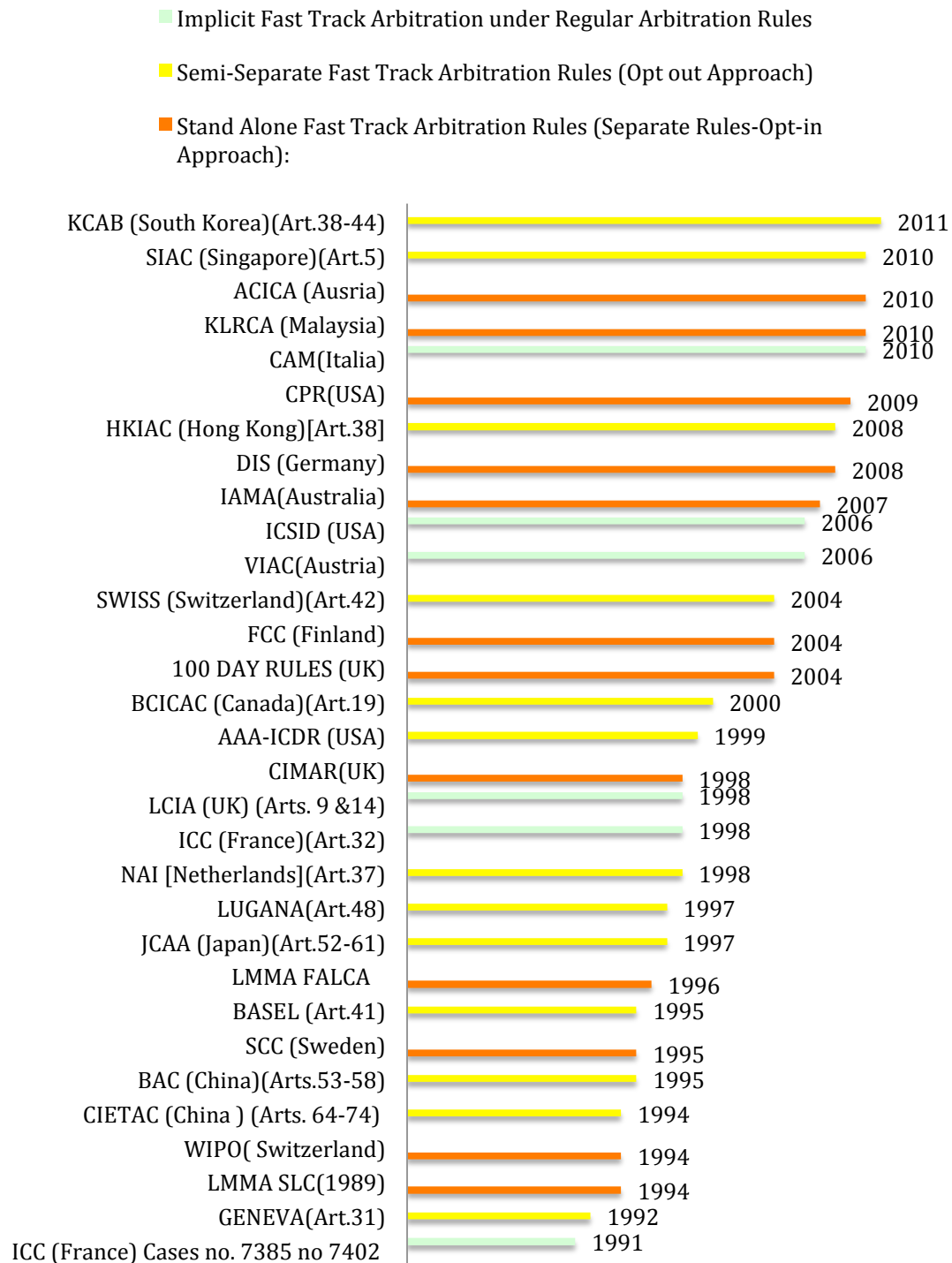
These are modest suggestions and others will wish to add their own suggestions derived from their own experience of fast-tracking international commercial arbitration. Once collated by the international arbitration community, they could make a difference to improving the scope for the wider application of FTA. But bad practices in FTA do tend to drive out good. If deficient FTA procedures are not addressed, cynicism will breed contempt for fast-track arbitral procedure. None of this is a cry of despair. On the contrary, it is a measure of the ever-increasing success of ICA that it must meet new challenges and provide new practical solutions on a larger scale.

APPENDIXES

Appendix 1



APPENDIX 2: NUMBER OF ARBITRAL INSTITUTIONS THAT ADOPTED RULES FOR FAST-TRACK ARBITRATION IN THE PAST 20 YEARS



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